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In the Supreme Court of the United States

OCTOBER TERM, 1992

92-1547

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

TRANSCON LINES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, under the filed rate doctrine and *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), the Interstate Commerce Commission (ICC) is barred from obtaining an injunction against a motor carrier's attempt to collect past-due freight charges in violation of the ICC's credit regulations, notwithstanding the ICC's express authority to regulate credit, 49 U.S.C. 10743(b), and to "bring a civil action * * * to enforce" the Interstate Commerce Act and regulations thereunder, 49 U.S.C. 11702(a)(5).

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the Interstate Commerce Commission; Transcon Lines; and Lenard Gumport, Trustee.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory and regulatory provisions involved	2
Statement	2
Reasons for granting the petition	8
Conclusion	19
Appendix A	1a
Appendix B	28a
Appendix C	29a
Appendix D	31a
Appendix E	58a
Appendix F	60a
Appendix G	61a

TABLE OF AUTHORITIES

Cases:

ADM of Miss. Inc. et al.—Petition for Declaratory Order—Rates and Practices of Campbell 66 Express, Inc., No. 40296 (ICC June 20, 1990)	12
Arkansas Louisiana Gas Co. v. *Hall*, 453 U.S. 571 (1981)	17
Delta Traffic Service, Inc. v. *ADM of Miss. Inc.*, No. 91-1098 (5th Cir. 1992)	12
Delta Traffic Service, Inc. v. *Mennen Co.*, 730 F. Supp. 1309 (D.N.J.), aff'd mem., 919 F.2d 134 (3d Cir. 1990)	12
Lifschultz Fast Freight, Inc. v. *National Mfg. Co.*, 804 F. Supp. 1059 (N.D. Ill. 1992)	12
Louisville & N.R.R. v. *Sloss-Sheffield Co.*, 269 U.S. 217 (1925)	5
Maislin Indus., U.S., Inc. v. *Primary Steel, Inc.*, 497 U.S. 116 (1990)	2, 8, 13
National Carloading Corp. v. *Atchison, T. & S.F. Ry.*, 150 F.2d 210 (9th Cir. 1945)	5

Cases—Continued: Page

National Indus. Transp. League—Petition To Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 I.C.C.2d 99 (1986) 9-10
Nonoperating Motor Carriers—Collection of Undercharges, 8 I.C.C.2d 742 (1992), petition for review pending *sub nom. White* v. *ICC*, No. 92-3528 (3d Cir.) 3
Petition To Institute Rulemaking on Negotiated Motor Common Carrier Rates, 5 I.C.C.2d 623 (1989) 10
Rebel Motor Freight, Inc. v. *ICC*, 971 F.2d 1288 (6th Cir. 1992) 12
Reiter v. *Cooper*, No. 91-1496 (Mar. 8, 1993) 8, 9, 14, 15, 18, 19
Southern Pacific Transp. Co. v. *Commercial Metals*, 456 U.S. 336 (1982) 3, 5-6, 13, 14, 19
The Mennen Co. v. *Campbell 66 Express, Inc.*, No. MC-C-30135 (ICC Sept. 6, 1989) 12

Statutes and regulations:

Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*:
49 U.S.C. 10701 9
49 U.S.C. 10743(a) 4, 10, 15, 61a
49 U.S.C. 10743(b) 4, 10, 61a
49 U.S.C. 10743(b)(1) 10
49 U.S.C. 10761 ..... 3, 10, 61a
49 U.S.C. 10762 ..... 10, 62a
49 U.S.C. 10762(a)(1) 3
49 U.S.C. 11702 ..... 64a
49 U.S.C. 11702(a)(5) 3, 15, 63a
49 U.S.C. 11705(b)(3) 9, 14, 63a
49 U.S.C. 11706(a) 13
49 C.F.R.:
Pt. 1320 ..... 4, 67a
Section 1320.2(c) 11, 69a
Section 1320.2(d) 11, 69a
Section 1320.2(e)(3) 4, 69a
Section 1320.2(g) 4, 70a
Section 1320.2(g)(1) 12, 70a

Regulations—Continued Page

Section 1320.2(g)(1)(i) 5, 70a
Section 1320.2(g)(1)(ii) 5, 12, 71a
Section 1320.2(g)(2)(i) 5, 71a
Section 1320.2(g)(2)(iii) 6, 71a
Section 1320.2(g)(2)(vi) 6, 72a
Section 1320.3(c) 5, 6, 73a

Miscellaneous:

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 2

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Acting Solicitor General, on behalf of the Interstate Commerce Commission (ICC), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-27a) is reported at 981 F.2d 402. The opinion of the district court (App., *infra*, 31a-59a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1992. Petitions for rehearing filed by the ICC and respondents were denied on November

25, 1992.[1] App., *infra*, 60a. On February 16, 1993, Justice O'Connor extended the time within which to petition for a writ of certiorari to and including March 25, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*, and the ICC's credit regulations, 49 C.F.R. 1320, are set forth in an appendix (App., *infra*, 61a-74a).

STATEMENT

This case involves a civil action filed by the ICC to enjoin respondents, Transcon Lines and its trustee in bankruptcy, from attempting to collect additional freight charges from shippers in violation of the ICC's credit regulations. The district court denied relief, finding that the alleged unlawful practices were authorized by Transcon's filed tariff and that the ICC's regulations were therefore unenforceable under the filed rate doctrine. The court of appeals affirmed, relying on this Court's decision in *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990). The court of appeals held that, notwith-

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[1] The court of appeals issued orders amending its opinion on October 23 and December 10, 1992, App., *infra*, 28a-30a. Those amendments did not alter the judgment of the court. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 6.4, at 314-315 (6th ed. 1986). The trustee in bankruptcy for Transcon Lines has filed additional petitions for rehearing in response to each amendment. The court of appeals has not acted on those petitions.

standing the ICC's express authority to "bring a civil action * * * to enforce" the provisions of the Interstate Commerce Act (Act), 49 U.S.C. 11702 (a)(5), and the ICC's "power to seek a federal-court injunction requiring a carrier to comply with the [credit] regulations," *Southern Pacific Transp. Co.* v. *Commercial Metals*, 456 U.S. 336, 349 (1982), Transcon's collection effort could proceed in violation of the ICC's regulations.

1. Transcon Lines was once the twelfth largest motor carrier in the United States. Pursuant to the Act's requirement that interstate motor common carriers must publish their shipping rates in tariffs filed with the ICC, 49 U.S.C. 10761, 10762(a)(1), Transcon filed tariffs with the ICC that set forth its rates. One of Transcon's tariffs set forth "discount" rates that were expressed as percentages of higher "bureau" tariff rates.[2] Transcon also had a "rules" tariff that contained a "loss-of-discount" provision. That provision stated that discounts "shall apply only when tariff charges are paid within 90 calendar days from the date of shipment," and indicated that pay-

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[2] A carrier typically files tariffs containing tiers of rates, from relatively high, collectively set bureau rates to a variety of lower discount rates for particular traffic and markets. In the past decade, the Commission has found that the bureau rates have been as much as 40 to 60 percent higher than the prevailing market rates. See *Nonoperating Motor Carriers—Collection of Undercharges*, 8 I.C.C.2d 742, 745 (1992), petition for review pending *sub nom. White* v. *ICC*, No. 92-3528 (3d Cir.). In this case, for example, one page of Transcon's discount tariff provides discount rates ranging from 20 to 55 percent of the bureau tariff rates. Vol. I, Resp. C.A. E.R. 41 (TCON 625, 9th Revised Page 587).

ment within that period was a "condition precedent" to application of the discount.[3] App., *infra*, 2a, 4a-5a.

The use of Transcon's "loss-of-discount" provision is subject to the Act's scheme for regulating the extension of credit. The Act requires that common carriers must retain possession of property until the shipper pays the full filed rate, 49 U.S.C. 10743(a), unless the ICC has promulgated regulations that permit carriers to "give up possession at destination of property transported * * * before [full] payment." 49 U.S.C. 10743(b). The ICC has promulgated detailed regulations governing the release of goods before payment. See 49 C.F.R. 1320; App., *infra*, 67a-74a. Under those regulations, where a carrier releases goods without payment, it may assess liquidated damages when seeking to collect overdue freight charges; those damages compensate the carrier for the costs of collection.[4] 49 C.F.R. 1320.2(g).

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[3] The provision stated (Vol. I, Resp. C.A. E.R. 41 (TCON 103-A, Item 210)):

> 1. [D]iscounts * * * shall apply when tariff charges are paid within 90 calendar days from date of shipment.
> 2. The provisions of this rule do not change the carrier's obligation to collect nor the freight charge payor's obligation to pay tariff charges within the standard credit period maintained by the carrier in compliance with ICC regulations, 49 CFR 1322. This rule simply establishes a condition precedent for the application of the specific tariff provisions described in paragraph 1 above.

[4] Liquidated damages are separate from, and in addition to, interest, which the carrier is allowed to charge a delinquent shipper under 49 C.F.R. 1320.2(e)(3). Interest compensates a carrier for the loss of the use of the money during the delinquency period and ensures that delinquent shippers do not enjoy an advantage over shippers who make timely pay-

The ICC's rules require the liquidated-damages provision to be contained in a tariff filing and permit the damages to be assessed in either of two ways: (1) as a "separate additional charge" (stated as a flat amount or as a percentage of the freight bill), 49 C.F.R. 1320.2(g)(1)(i), or (2) as "the full, non-discounted rate instead of the discounted rate otherwise applicable." 49 C.F.R. 1320.2(g)(1)(ii). The latter provision, a "loss-of-discount" provision, was employed by Transcon.

The ICC's regulations also place several mandatory conditions on any efforts by the carrier to collect such liquidated damages, three of which are relevant here. First, the carrier must specifically state the liquidated damages that apply to late payments in the original bill for the shipment. 49 C.F.R. 1320.3(c). Second, the carrier must issue a revised freight bill that includes the liquidated damages charge within 90 days after the expiration of the authorized credit period. 49 C.F.R. 1320.2(g)(2)(vi). Third, the carrier may apply liquidated damages "only to the non-payment of original, separate and independent freight bills and shall not apply [them] to aggregate 'balance-due' claims sought for collection on past shipments by a bankruptcy trustee, or any other person or agent." 49 C.F.R. 1320.2(g)(2)(iii).

A shipper cannot raise the carrier's violation of the credit regulations in defense of an action to collect the filed rate. *Southern Pacific Transp. Co.* v. *Com-*

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ments. See *Louisville & N.R.R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 238-240 (1925) (interest allowed on reparation order); *National Carloading Corp.* v. *Atchison, T. & S.F. Ry.*, 150 F.2d 210, 214 (9th Cir. 1945) (interest allowed on undercharge claim).

mercial Metals, 456 U.S. 336 (1982). The ICC, however, has "ample authority to police the credit practices of carriers and thereby to deter improper practices," *id.* at 349, as well as the discretion to frame appropriate "remedies for a carrier's violations of the [credit] regulations." *Id.* at 352.

2. After Transcon filed for bankruptcy, its trustee engaged a rate auditor, collection agency, and collection attorney to review the carrier's tariffs and accounts. As a result of those efforts, respondents sought to collect approximately $8 million in unpaid freight charges and approximately $15 million in additional charges. App., *infra*, 3a. The additional charges were based on claims that the shippers had not paid, within 90 days after shipment, the amount the trustee now claims should have been charged, and that, accordingly, the shippers were not entitled to the discount rate. In such instances, the trustee sought to collect the higher bureau rate. *Id.* at 17a.

The ICC brought this action in district court to enjoin respondents from applying the loss-of-discount credit provision to shippers in violation of ICC regulations. Specifically, the ICC alleged that Transcon's original bills did not advise shippers of the consequence of late payment, as required by 49 C.F.R. 1320.3(c); revised bills were not issued until several years after the 90-day period provided in 49 C.F.R. 1320.2(g)(2)(vi); and the trustee sought to apply the loss-of-discount provision on an aggregate basis, contrary to 49 C.F.R. 1320.2(g)(2)(iii). The ICC requested an injunction against collection efforts by respondents that violated those regulations. App., *infra*, 3a; Complaint, Gov't C.A. E.R. 1-7.

The district court granted summary judgment for respondents. The court held that because Transcon's loss-of-discount provision was found in its filed tariff, the ICC's regulations could not be applied to prevent enforcement of it. The court concluded that the ICC's regulations, as applied here, were not "valid as against the filed rate doctrine." [5] App., *infra*, 49a (Tr. 24).

3. The court of appeals affirmed in relevant part.[6] The court recognized that Transcon's trustee stands in the shoes of the carrier and is therefore subject to the ICC's authority to "bring a civil action of enforcement against the carrier's estate, 49 U.S.C. § 11702." App., *infra*, 13a. The court also recognized that the district court had erred in holding that the ICC's credit regulations were simply invalid. *Id.* at 18a, 21a. Nevertheless, the court of appeals concluded that the ICC could not enjoin Transcon from enforcing its loss-of-discount provision in violation of ICC credit regulations "because the Commission's regulations cannot be enforced in this way to undercut the filed rate." *Id.* at 2a. The court explained:

> Regulations, however valid in other contexts, cannot furnish the reason for letting the carrier abandon the filed rate. The ICC's interpretation of these regulations to allow such a result then

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[5] The court also accepted the trustee's argument that Transcon's discount tariffs were invalid because the tariffs identified shippers by account code rather than by name. App., *infra*, 45a-47a, 54a.

[6] The court of appeals reversed the district court's holding with respect to shipper account codes (see note 5, *supra*) on the ground that the trustee lacked standing to challenge the validity of the carrier's tariffs. App., *infra*, 21a-27a. That holding is not at issue here.

> has no greater force than the policy rejected in *Maislin*. Although the Act authorizes the ICC to regulate carrier credit, the filed rate doctrine trumps the manner in which the ICC seeks to regulate carrier credit in this case, just as in *Maislin* it trumped the policy the ICC had adopted pursuant to its statutory authority to determine the reasonableness of a practice. The filed rate requirement, as *Maislin* holds, is controlling.

App., *infra*, 19a.

REASONS FOR GRANTING THE PETITION

This case involves a significant enforcement action by the ICC, designed to prevent the bankruptcy estate of one of the Nation's largest motor carriers from circumventing the Commission's duly authorized credit regulations. The court of appeals rejected the ICC's action based on an overbroad reading of the filed rate doctrine and this Court's decision in *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, *supra*. The effect of that ruling is to frustrate the ICC's regulatory mandate and to expose shippers to excessive charges. There is no justification for those results.

The filed rate doctrine provides that a shipper may not refuse to pay the filed rate on the ground that the shipper was ignorant of the tariff rate, that the carrier misquoted it, or that the parties agreed to a different rate. The doctrine, however, does not defeat a shipper's "claims and defenses that are specifically accorded by the [Act] itself." *Reiter* v. *Cooper*, No. 91-1496 (Mar. 8, 1993), slip op. 7 (holding that filed rate doctrine does not prevent shipper's assertion of reparations counterclaim, pursuant to

49 U.S.C. 11705(b)(3)). That principle applies with even greater force to injunctive actions brought by the ICC to effect compliance with the requirements of the Act. The court of appeals seriously erred in concluding that the filed rate doctrine prevents the agency vested with responsibility for enforcing the Act from compelling adherence to valid regulations.

The consequences of the court of appeals' decision warrant this Court's attention. By stripping the ICC of authority to enforce its credit regulations within the Ninth Circuit, the decision exposes thousands of shippers to claims that directly violate governing ICC regulations. And by allowing carriers to avoid ICC regulation by inserting contrary terms in their tariffs, the decision undermines the ICC's regulatory responsibilities and threatens to sow confusion in the application of the filed rate doctrine. *Maislin* does not justify those results—as this Court's recent decision in *Reiter* v. *Cooper* makes clear. In view of the clarity of the court of appeals' error and the magnitude of the decision's impact on shippers, this Court should intervene.

1. In *Maislin*, this Court considered an ICC policy that was formulated to respond to widespread efforts by bankrupt motor carriers and their trustees to collect filed tariff rates from shippers who years earlier had negotiated lower rates. While the carriers were obligated to file the negotiated rates in ICC tariffs and shippers believed they had done so, the carriers often failed to make proper tariff filings. The ICC found that such solicitation and billing activities were an "unreasonable practice," and therefore in violation of 49 U.S.C. 10701.[7] This Court dis-

[7] See *National Indus. Transp. League—Petition To Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3

agreed. The Court relied on the Act's requirements that carriers must file their rates in tariffs and shippers must pay the filed rates, 49 U.S.C. 10761, 10762, and held that the ICC was precluded from making the shipper's agreement to a different rate an equitable defense that permitted avoidance of the filed tariff. *Maislin*, 497 U.S. at 126-133.

The court of appeals erroneously extended *Maislin* to the very different setting of this case. Here, the ICC has not recognized an equitable defense based on a negotiated, unfiled rate; rather, the ICC is enforcing an express regulatory requirement of the Act dealing with the extension of credit.

The Act provides that the only circumstance in which a carrier may release goods on credit is where the carrier complies with ICC regulations; otherwise, the Act requires the carrier to retain possession of the property transported until full payment of the filed rate is tendered.[8] And, when a carrier has released goods on credit, its collection of liquidated damages as a late-payment charge may proceed only in compliance with governing regulations promulgated by the ICC. 49 U.S.C. 10743(b).

I.C.C.2d 99 (1986); *Petition To Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (1989).

[8] The Act provides that "[e]xcept as provided in subsection (b) of this section, a common carrier * * * shall give up possession at destination of property transported by it only when payment for the transportation or service is made." 49 U.S.C. 10743(a). Subsection (b) states that "[u]nder regulations of the Commission governing the payment for transportation and service and preventing discrimination, those carriers may give up possession at destination of property transported by them before payment for the transportation or service." 49 U.S.C. 10743(b)(1); App., *infra*, 61a.

The court of appeals did not dispute that respondents have violated the conditions established in the ICC's regulations for collecting liquidated damages.[9] Nevertheless, the court of appeals endorsed a blanket rule permitting respondents to ignore those regulations, and to seek penalties from shippers who did not pay, within 90 days of shipment, the charges now asserted to be applicable, because Transcon's tariff stated that the "[d]iscounts * * * shall apply only when tariff charges are paid within 90 calendar days from the date of shipment." See note 3, *supra*. The court believed its holding was compelled by *Maislin*, which it read as precluding the ICC from "applying its regulations in such a way as to undercut the filed rate requirement." App., *infra*, 19a.

The court of appeals' reliance on *Maislin* fails for two separate reasons. First, the ICC's application of its credit regulations to respondents does not undercut the filed rate requirement. The rate that shippers are required to pay—the discount rate set forth in Transcon's tariff—*is* the filed rate. The higher rate produced by application of Transcon's loss-of-discount provision is plainly a credit term. It is available only because ICC regulations authorize carriers to release goods without payment and then to define liquidated damages for late payment by

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[9] Transcon and its trustee ignored the requirements that (1) shippers be notified in the original bill about the applicability of liquidated damages; (2) rebillings be made within 90 days of expiration of the authorized credit period (which may not extend beyond 30 days after shipment (49 C.F.R. 1320.2(c) and (d)); and (3) liquidated damages may not apply to aggregate balance due claims. See p. 5, *supra*.

reference to the non-discounted tariff rate.[10] Accordingly, the injunction sought here would simply enforce ICC regulations on liquidated damages; it would not interfere with enforcement of the filed rate or the carrier's collection of interest.[11]

Second, even on the assumption that the bureau rate produced by application of Transcon's loss-of-

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[10] As discussed above, see p. 5, *supra*, the ICC's regulations allow carriers to use "one of two methods in their tariffs" to define the "reasonable and certain liquidated damages for all costs incurred in the collection of overdue freight charges." 49 C.F.R. 1320.2(g)(1). Transcon elected the second method, which requires "payment of the full, nondiscounted rate instead of the discounted rate otherwise applicable." 49 C.F.R. 1320.2(g)(1)(ii). The application of the "full, nondiscounted rate" does not convert the nondiscount rate into the filed rate; rather, the ICC's regulations provide that "[t]he difference between the discount and the full rate constitutes a carrier's liquidated damages for its collection effort." *Ibid.*

[11] Other courts have recognized that *Maislin* is inapplicable where the rate being enforced *is* a filed rate. See *Rebel Motor Freight, Inc.* v. *ICC*, 971 F.2d 1288, 1294 (6th Cir. 1992). Similarly, other courts have rejected the claim that loss-of-discount terms can be enforced in violation of ICC regulations. *ADM of Miss. Inc. et al.—Petition for Declaratory Order—Rates and Practices of Campbell 66 Express, Inc.*, No. 40296 (ICC June 20, 1990), aff'd, *Delta Traffic Service, Inc.* v. *ADM of Miss. Inc.*, No. 91-1098 (5th Cir. 1992) (unpublished opinion) (refusing to enforce loss-of-discount term that conflicted with the ICC's credit regulations); *The Mennen Co.* v. *Campbell 66 Express, Inc.*, No. MC-C-30135 (ICC Sept. 6, 1989), aff'd, *Delta Traffic Service, Inc.* v. *Mennen Co.*, 730 F. Supp. 1309 (D.N.J.), aff'd mem., 919 F.2d 134 (3d Cir. 1990); *Lifschultz Fast Freight, Inc.* v. *National Mfg. Co.*, 804 F. Supp. 1059 (N.D. Ill. 1992) (explicitly rejecting the Ninth Circuit's analysis in this case and referring to the ICC the issue of whether the credit regulations in question had been violated).

discount provision is a filed rate, entitled to the full protection of the filed rate doctrine, *Maislin* does not support the court of appeals' decision. The holding of *Maislin* is that the ICC may not define as an "unreasonable practice" a carrier's attempt to collect a filed rate rather than a negotiated one. *Maislin*, however, does not free carriers from complying with other requirements of the Act that determine when and how filed rates may be enforced.[12] *Maislin* itself recognizes that the filed rate doctrine "contains an important caveat: [t]he filed rate is not enforceable if the ICC finds the rate to be unreasonable." 497 U.S. at 128. By the same reasoning, the filed rate is not enforceable if the ICC finds that the carrier is violating applicable credit regulations and seeks to enjoin that conduct. By failing to recognize *Maislin*'s accommodation of other provisions of the Act, the court of appeals gave an unjustifiable sweep to the filed rate requirement.

Under the court of appeals' reading of *Maislin*, the ICC's explicit statutory power to regulate the extension of credit is nullified. That conclusion is diametrically opposed to this Court's view in *Southern Pacific Transp. Co.* v. *Commercial Metals*, *supra*, that the "[t]he remedies for a carrier's violation of the [credit] regulations are best left to the ICC for such

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[12] A contrary reading of *Maislin* would imply that the filed rate doctrine would trump even the statute of limitations provision of the Act. See 49 U.S.C. 11706(a) (carrier must bring suit within three years after the claim accrues). Obviously, *Maislin* did not override that express condition that the Act places on collection of a filed rate. Nor does it override other express conditions, such as the prohibition of credit except as authorized by the ICC's credit regulations and the ICC's express enforcement power.

resolution as it thinks proper," 456 U.S. at 352, and that such remedies include "the power to seek a federal-court injunction requiring a carrier to comply with the regulations." *Id.* at 349. Here, the ICC exercised the power acknowledged in *Commercial Metals*, but the court of appeals frustrated it. While purporting not to disturb the ICC's power to enforce its regulations, App., *infra*, 18a, the court has, in fact, rendered them toothless.[13]

If there were any doubt that the court of appeals' decision overextends *Maislin*, it is dispelled by this Court's decision in *Reiter* v. *Cooper*, No. 91-1496 (Mar. 8, 1993). In that case, the Court held that a shipper may assert as a counterclaim in an undercharge action the right of reparations for unreasonable rates provided in 49 U.S.C. 11705(b)(3). The Court rejected the contention, tellingly analogous to that accepted by the court of appeals here, that "the so-called 'filed rate doctrine' gives [the carrier and its trustee] absolute entitlement to judgment on their undercharge claims, without defense or counterclaim." Slip op. 7. The Court explained:

> The filed rate doctrine embodies the principle that a shipper cannot avoid payment of the tariff rate by invoking common-law claims and de-

[13] The precise holding of *Commercial Metals* is that courts may not create an implied equitable defense to a carrier's collection of the tariff rate based on the carrier's violation of the ICC's credit regulations. In light of the court of appeals' decision, neither the courts nor the Commission can remedy respondents' violations of the credit regulations. The court of appeals had no adequate reason for giving respondents impunity to violate valid regulations, despite this Court's acknowledgement that the ICC may frame appropriate remedies for such violations.

> fenses such as ignorance, estoppel, or prior agreement to a different rate. • • • It assuredly does *not* preclude avoidance of the tariff rate, however, through claims and defenses that are specifically accorded by the ICA itself. We can agree with respondents that this latter category does not include any "unreasonable-rate defense," derived from the general ICA requirement (now codified in § 10701(a)) that a carrier's rates be "reasonable." • • • But we cannot agree that the filed rate doctrine precludes shippers from asserting (by way of claim *or* counterclaim) the reparations rights explicitly conferred by § 11705(b)(3).

Slip op. 7.

In light of *Reiter*, it is clear that the court of appeals' view of *Maislin* is untenable. Not only does the ICC have explicit statutory authority to regulate credit, it has explicit statutory authority to "bring a civil action • • • to enforce" the Act (including Section 10743(a)'s prohibition of credit transactions except as authorized by ICC regulations). 49 U.S.C. 11702(a)(5).[14] Just as the respondents in *Reiter* erred in claiming that the filed rate doctrine trumps "the reparations rights explicitly conferred" by the Act, slip op. 7, here, the court of appeals erred in holding that the filed rate doctrine trumps the ICC's credit regulations and enforcement rights explicitly conferred by the Act.

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[14] That provision states: "The Interstate Commerce Commission may bring a civil action—to enforce this subtitle • • • or a regulation or order of the Commission • • • when violated by a [motor] carrier providing transportation subject to the jurisdiction of the Commission • • •." 49 U.S.C. 11702(a)(5); App., *infra*, 64a-65a.

2. The court of appeals' error is of considerable importance to the ICC and the transportation industry generally. Millions of shippers around the country rely on the ICC's credit regulations in arranging transportation with motor carriers. Under the court of appeals' decision, however, the ICC has no effective remedy to enforce compliance with those regulations. When shippers are exposed to unjustified claims, it harms entities that ICC regulation is designed to protect and erodes public confidence in the stability of the regulated trucking industry. The court of appeals' ruling creates a particularly serious threat, because it calls into question whether shippers can rely on any aspect of ICC regulations regarding interstate transportation. If a carrier can supersede the ICC's credit regulations by the provisions it puts in its tariffs, as the court of appeals believed, it is difficult to understand why a carrier could not override any other ICC regulation by placing contrary terms in its tariff.

The court of appeals' decision not only significantly impairs the ICC's ability to perform its regulatory functions, but also has substantial financial implications. If the court of appeals' decision is left undisturbed, respondents will be able to collect an additional $15 million from more than a thousand shippers, despite the violation of the ICC's credit regulations. And the impact of this ruling goes far beyond this one carrier. Loss-of-discount provisions have been common in the motor carrier industry, and other carriers and bankruptcy trustees have asserted the right to collect charges from former shippers by enforcing credit terms contrary to the ICC credit

regulations.[15] Because of the importance of this case, the decision below will likely encourage other defunct carriers to assert analogous loss-of-discount provisions.[16]

The proper operation of thhe filed rate doctrine is significant under both the Interstate Commerce Act and other schemes of regulation that involve regulated rates.[17] The holding below distorts that doctrine, departs from this Court's decisions, and creates confusion for the ICC and regulated entities.

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[15] For example, the trustee and creditors of P*I*E Nationwide, formerly one of the largest carriers in the country, have already brought such claims. See *e.g.*, *Fidelcor Business Credit Corp.* v. *Dillard Dep't Stores*, No. 91-953-CIV-J-16 (M.D. Fla.) (P*I*E creditor seeks to collect some $1 million in undercharges from a shipper, based on loss-of-discount provision); *Whitaker* v. *Younkers*, No. 91-448 (Bankr. M.D. Fla.) (P*I*E trustee seeking more than $31,000 in credit-related claims against one shipper).

[16] The adverse consequences will be felt by shippers immediately. Many shippers are small businesses that cannot withstand years of litigation to determine whether a defunct carrier's claims are valid. Even a shipper with a valid defense may well conclude that the risks of litigation, coupled with the substantial loss-of-discount penalty if the shipper loses, makes it impracticable to resist the carrier's claims. The problem is heightened where, as here, a carrier invokes the loss-of-discount penalty not only against delinquent shippers, but also against shippers who paid their bills on time and whose accounts are now claimed to be past due solely because the carrier's auditor has retrospectively rebilled for an increased amount. The loss-of-discount penalty therefore gives substantial leverage to defunct carriers.

[17] See *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981) ("The filed rate doctrine has its origins in this Court's cases interpreting the Interstate Commerce Act, * * * and has been extended across the spectrum of regulated utilities.").

In our view, the proper course at this juncture is for the Court to vacate the judgment and remand the case to the court of appeals for further consideration in light of *Reiter* v. *Cooper*, *supra*. The central premise of the court of appeals' ruling was that *Maislin* requires enforcement of tariff provisions, regardless of anything else stated in the Act. Although that holding was incorrect on its own terms, *Reiter* makes it clear that *Maislin* does not have the reach ascribed to it by the court of appeals. If the court of appeals were to reconsider its decision in light of *Reiter*, and to conclude that it had erred in its expansive application of the filed rate doctrine, plenary review by this Court would be unnecessary. Accordingly, because the court of appeals did not have the benefit of this Court's recently issued opinion in *Reiter*, and because that opinion undermines the principal rationale of the court of appeals' opinion, that court should have the opportunity to reexamine its decision in light of *Reiter*.[18]

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[18] Alternatively, this Court may wish to consider summary reversal of the judgment in view of the Court's recognition in *Commercial Metals* that the ICC may enforce its credit regulations through an injunction.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment should be vacated, and the case remanded for further consideration in light of *Reiter* v. *Cooper*, *supra*. In the alternative, the judgment of the court of appeals should be summarily reversed, on the authority of that decision and *Southern Pacific Transp. Co.* v. *Commercial Metals*, *supra*.

Respectfully submitted.

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MARCH 1993

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No 92-55036

INTERSTATE COMMERCE COMMISSION
PLAINTIFF-APPELLANT

v.

TRANSCON LINES, a corporation;
LEONARD L. GUMPORT, Chapter 7 Trustee,
DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Central District of California

Argued and Submitted April 8, 1992

Decided June 17, 1992

As Amended Oct. 23, 1992

Before: BOOCHEVER, NORRIS and NOONAN, Circuit Judges.

NOONAN, Circuit Judge:

The Interstate Commerce Commission (the ICC or the Commission) brought suit against Transcon Lines (Transcon) and its trustee in bankruptcy, Leonard Gumport (the Trustee), seeking an injunction

against the collection of freight charges in violation of ICC credit regulations or in excess of Transcon's tariffs filed with the Commission. The district court granted summary judgment to the defendants. The ICC appeals.

The case presents several unusual elements: a challenge by the Trustee to the ICC's credit regulations as subversive of the traditional "filed rate doctrine"; the Trustee's repudiation of certain of Transcon's own filed tariffs; the assertion by the Trustee of authority to collect from Transcon's shippers a very large amount of undercharges. We disagree with the reasoning of the district court on these issues and remand to the district court for entry of an injunction against certain of the Trustee's collection activities. At the same time we affirm the district court's denial of an injunction against the Trustee's collection of overdue freight charges.

BACKGROUND

Transcon was once the twelfth largest motor carrier in the United States, with annual revenues of over $200 million. It engaged in its operations as a common and contract carrier in interstate commerce pursuant to authority issued to it by the ICC. On May 1, 1990, an involuntary bankruptcy petition was filed against it in the United States Bankruptcy Court, Central District of California. On May 21, 1990, Transcon consented to an order for relief under Chapter 11. Leonard Gumport was appointed its trustee. On July 10, 1991, the bankruptcy court converted the proceeding to one under Chapter 7 and on July 17, 1990, appointed Gumport the Chapter 7 trustee.

On August 23, 1990, the Trustee obtained authority from the bankruptcy court to employ a rate auditor, a collection agency, and collection attorneys for the purpose of collecting freight charges due Transcon prior to its bankruptcy petition. With the aid of these auxiliaries, the Trustee began efforts to collect from shippers an estimated $8 million in unpaid freight charges, consisting of both unbilled charges and charges which, though billed, remained uncollected. The Trustee also began efforts to collect from shippers an estimated $15 million in additional freight charges.

In this suit, filed September 17, 1991, the ICC asserted that the Trustee in his collection efforts was seeking to collect charges in excess of the tariffs filed by Transcon with the ICC and in numerous such instances had asserted a loss-of-discount remedy for non-payment or untimely payment of an original freight bill without complying with the ICC's regulations governing a carrier's extension of credit and a carrier's remedies against a shipper who received credit but did not pay at the agreed-upon time. The ICC provided a sampling of such charges, showing, *e.g.*, against Marson Corporation 28 claims by Transcon for shipments between January and April 1990, for which the total originally billed by Transcon was $9,631.09; of which Marson had originally paid $7,307.91; and for which the Trustee now sought to collect not only the balance remaining but $7,772.85 as the loss-of-discount remedy for failure to pay on time.

The Trustee answered the ICC's complaint on October 8, 1991. The Trustee denied that the ICC had jurisdiction over him in that Transcon was no longer an operating common carrier in interstate commerce.

The Trustee further denied that the ICC's credit regulations were in accordance with the statute authorizing such regulations, 49 U.S.C. § 10743, and went on to offer three "affirmative defenses," viz. (1) that Transcon's "entire discount scheme" was "an unlawful secret rebate scheme" that the Trustee could not enforce or be compelled to enforce; (2) that Transcon's "discount tariffs on file with the Interstate Commerce Commission violated the 'anti-credit' statutes set forth at 49 U.S.C. § 10743;" and (3) that the ICC's credit regulations violated "the filed rate doctrine as set forth in the case of *Maislin Industries v. Primary Steel*, 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990)."

That Transcon filed with the ICC a variety of rates is undisputed. One rate was derived from a combination of "the class rate" and "the bureau tariff." The class rate came from the National Motor Freight Classification, filed with the ICC on behalf of Transcon and other carriers by the National Motor Freight Traffic Association, Inc. In this gigantic compilation of shippable goods, a class was assigned to every shippable object in terms of its weight, shape, and other characteristics affecting transportability. "Bureau tariffs" were also filed by agents for various collectivities of carriers, *e.g.*, the Rocky Mountain Tariff Bureau. The bureau tariff determines the cost of movement by carrier between any two points in the United States for the goods classified under the National Motor Freight Classification. This freight charge, commonly referred to as "the bureau rate," was on file with the ICC on behalf of Transcon as it was on file for other common carriers.

Transcon also filed with the ICC a "rules tariff." This tariff specified, in relevant part, that discounts

"shall apply only when tariff charges are paid within 90 calendar days from the date of shipment." This document added that it "simply establishe[d] a condition precedent," *i.e.*, timely payment, for a discount to be given.

Transcon did, in fact, give discounts to shippers. These discounts, too, were filed with the ICC in a tariff labelled TCON 625. Ninety percent of all discounts given by Transcon were given under TCON 625. In over 98% of the discounts given under TCON 625 the shipper was identified only by a code number. Transcon kept an index to the code for its own use. The index was neither filed with the ICC nor open to the public.

STATUTES, REGULATIONS, AND POLICY

The most relevant statutes, set out in 49 U.S.C. are these:

> **§ 107143. Payment of rates**
>
> (a) Except as provided in subsection (b) of this section, a common carrier (except a pipeline or sleeping car carrier) providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under this subtitle shall give up possession at destination of property transported by it only when payment for the transportation or service is made.
>
> (b) (1) Under regulations of the Commission governing the payment for transportation and service and preventing discrimination, those carriers may give up possession at destination of property transported by them before payment for the transportation or service.

§ 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device. . . .

§ 11702. Enforcement by the Interstate Commerce Commission

(a) The Interstate Commerce Commission may bring a civil action— . . .

(4) to enforce this subtitle (except a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates), or a regulation or order of the Commission or a certificate or permit issued under this subtitle when violated by a motor carrier or broker providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title or by a foreign motor carrier or foreign motor private carrier providing transportation under a certificate of

registration issued under section 10530 of this title.

The relevant regulations issued by the ICC under 49 U.S.C. § 10743 are set out in 49 C.F.R. § 1320 (as amended through July 24, 1989).[1]

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[1] § 1320.1 Scope.

(a) *General.* These regulations apply to the extension of credit in the transportation of property under Interstate Commerce Commission regulation by rail, motor, and water carriers and household goods freight forwarders, except as otherwise provided. . . .

§ 1320.2 Extension of credit to shippers.

(a) *Authorization to extend credit.* (1) A carrier that meets the requirements in paragraph (a) (2) of this section may—

(i) Relinquish possession of freight in advance of the payment of the tariff charges, and

(ii) Extend credit in the amount of such charges to those who undertake to pay them (such persons are called "shippers" in this part).

(2) For such authorization, the carrier shall take reasonable actions to assure payment of the tariff charges within the credit periods specified—

(i) In this part, or

(ii) In tariff provisions published pursuant to the regulations in paragraph (d) of this section.

(b) *When the credit period begins.* The credit period shall begin on the day following presentation of the freight bill.

(c) *Length of credit period.* Unless a different credit period has been established by tariff publication pursuant to paragraph (d) of this section, the credit period is 15 days. It includes Saturdays, Sundays, and legal holidays.

(d) *Carriers may establish different credit periods in tariff rules.* Carriers may publish tariff rules establishing credit periods different from those in paragraph (c) of this section. Such credit periods shall not be longer than 30 calendar days.

(e) *Service charges.* (1) Service charges shall not apply when credit is extended and payments are made within the

The relation of many of these regulations to bankruptcy was made evident in a memorandum issued by the ICC on October 9, 1991, on "enforcement policy"

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standard credit period. The term "standard credit period," as used in the preceding sentence, means—

(i) The credit period prescribed in paragraph (c) of this section, or

(ii) A substitute credit period published in a tariff rule pursuant to the authorization in paragraph (d) of this section.

(2) Carriers may, by tariff rule, extend credit for an additional time period, subject if they wish to a service charge for that additional time. The combined length of the carrier's standard credit period (as defined in paragraph (e) (1) of this section) and its additional credit period shall not exceed the 30-day maximum credit period prescribed in paragraph (d) of this section. When such a tariff rule is in effect, shippers may elect to postpone payment until the end of the extended credit period if, in consideration therefor, they include any published service charges when making their payment.

(3) Carriers may, by tariff rule, establish service charges for payments made after the expiration of an authorized credit period. Such a rule shall—

(i) Institute such charges on the day following the last day of an authorized credit period, and

(ii) Notify shippers—

(A) That its only purpose is to prevent a shipper who does not pay on time from having free use of funds due to the carrier.

(B) That it does not sanction payment delays, and

(C) That failure to pay within the authorized credit period will, despite this provision for such charges, continue to require the carrier, before again extending credit, to determine in good faith whether the shipper will comply with the credit regulations in the future.

(4) Tariff rules that establish charges pursuant to paragraph (e) (2) or (3) of this section may establish minimum charges.

to its Office of Compliance and Consumer Assistance —Enforcement Staff (OCCA). The memorandum, after reviewing the beneficial effects of the policy guidelines issued by the ICC in 1988, declared:

(f) *Discounts.* Carrier may, by tariff rule, authorize discounts for early freight bill payments when credit is extended.

(g) (1) *Collection expense charges.* Carrier may, by tariff rule, assess reasonable and certain liquidated damages for all costs incurred in the collection of overdue freight charges. Carriers may use one of two methods in their tariffs:

(i) The first method is to assess liquidated damages as a separate additional charge to the unpaid freight bill. In doing so, the tariff rule shall disclose the exact amount of the charges by stating either a dollar or specified percentage amount (or a combination of both) of the unpaid freight bill. The tariff shall further specify the time period (which shall at least allow for the authorized credit period) within which the shipper must pay to avoid such liquidated damages.

(ii) The second method is to require payment of the full, nondiscounted rate instead of the discounted rate otherwise applicable. The difference between the discount and the full rate constitutes a carrier's liquidated damages for its collection effort. Under this method the tariff shall identify the discount rates that are subject to the condition precedent and which require the shipper to make payment by a date certain. The date certain may not be set to occur by the carrier until at least after the expiration of the carrier's authorized credit period.

(2) The damages, the timing of their applicability, and the conditions, if any, as provided by the tariff rule methods allowed under paragraphs (g) (1) (i) and (ii) of this section also:

(i) Shall be clearly described in the tariff rule;

(ii) Shall be applied without unlawful prejudice and/or unjust discrimination between similarly situated shippers and/or consignees;

(iii) Shall be applied only to the non-payment of original, separate and independent freight bills and shall not apply to

Other parts of the guidelines have not worked as well. Departure from the filed tariff has been treated as a rebate or concession which was excluded from the high emphasis enforcement list.

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aggregate "balance-due" claims sought for collection on past shipments by a bankruptcy trustee, or any other person or agent;

(iv) Shall not apply to instances of clear clerical or ministerial error such as non-receipt of a carrier's freight bill, or shipper's payment check lost in the mail, or carrier mailing of the freight bill to the wrong address;

(v) Shall not apply in any way to a charge for a transportation service if the carrier's bill of lading independently provides that the shipper is liable for fees incurred by the carrier in the collection of freight charges on that same transportation service;

(vi) Shall be applied only after the authorized credit period, and when the carrier has issued a revised freight bill or notice of imposition of collection expense charges for late payment within 90 days after expiration of the authorized credit period.

(3) As an alternative to the tariff-rule methods allowed under paragraphs (g) (1) (i) and (ii) of this section, a carrier may, wholly outside of its tariff, assess collection charges through [sic] contract terms in a bill of lading. By using the carrier and its bill of alding, the shipper accepts the bill of lading terms.

(h) *Discrimination prohibited.* Tariff rules published pursuant to paragraphs (d), (e), and (f) of this section shall not result in unreasonable discrimination among shippers.

§ 1320.3 Presentation of freight bills.

(c) *Bills or accompanying written notices shall state penalties for late payment, credit time limits and service charge and/or collection expense charge and discount terms.* When credit is extended, freight bills or a separate written notice accompanying a freight bill or a group of freight bill or a group of freight bills presented at one time shall state that "failure timely to pay freight charges may be subject to tariff penal-

However, in the partially deregulated and highly competitive environment of the 1980's, numerous carriers failed to file tariffs reflecting agreed to reduced rates. The subsequent bankruptcy of some of these carriers, and the ensuing efforts of zealous auditors to find any additional monies that might be collected on behalf of those carriers' estates, resulted in a flood of civil actions to collect undercharges from shippers. The Commission's first attempt to deal with this problem (by declaring these carriers' actions an unreasonable practice that would bar collection of the filed rate) was rejected by the Supreme Court.

The widespread bombarding of shippers with undercharge claims has created instability and confusion. In light of this development, it is important that motor carriers and the shipping public continue to be sensitive to the requirement for common carriers to file their rates and adhere to them. Accordingly, tariff filing requirements are worthy of increased attention and cannot be relegated to a low emphasis category. OCCA will consider enforcement action where feasible against carriers who fail to assess and collect filed rates and shippers who knowingly receive such concessions and rebates. Factors to be taken into consideration include whether the number and size of the balance due bills would affect prosecutive merit, whether the nature of the tariff departures make pursuit of the violations appropriate whether the carrier is in bank-

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ties" (or a statement of similar import). The bills or other notice shall also state the time by which payment must be made and any applicable service charge and/or collection expense charge and discount terms.

ruptcy, whether there are pending related Commission proceedings, whether there is a willingness on the part of the carrier to discontinue the unlawful practice and make refunds and whether the enforcement action will be cost effective. The foregoing are merely guidelines which OCCA may follow.

PROCEEDINGS

Conceding that no material facts were in dispute, each party moved for summary judgment. The district court held a hearing on the morning of November 25, 1991. After argument, the district court denied the ICC's motion for summary judgment and granted the Trustee's and Transcon's cross-motion for summary judgment. In open court in explanation of its judgment the district court gave two reasons: First, the ICC credit regulations conflicted with the filed rate of Transcon. *Maislin*, 110 S.Ct. 2759, held that an ICC policy could not permit departure from the filed rate; neither, the district court reasoned, could ICC regulations. Second, the failure of the filed discount rate to disclose the name of the customer being given the rate made the filed discount rates illegal; they violated the requirement, read into the statute by *United States v. Chicago and A. Ry. Co.*, 148 F. 646 (1906), *aff'd on other grounds* 156 F. 558 (7th Cir.1907), *aff'd per curiam*, 212 U.S. 563, 29 S.Ct. 689, 53 L.Ed. 653 (1909), that the customer be identified in the filing.

The district court denied the ICC's motion for reconsideration.

The ICC appeals, joined by the United States pursuant to 28 U.S.C. § 517.

ANALYSIS

Jurisdiction. The Trustee has not argued to this court the position he adopted in his answer to the ICC's complaint. Jurisdiction is not now contested. The Trustee stands in the shoes of a motor carrier regulated by the ICC. It would defeat the purpose of the regulatory scheme to hold that bankruptcy ended the ICC's enforcement powers over the carrier. We hold that the ICC is authorized by the statute to bring a civil action of enforcement against the carrier's estate, 49 U.S.C. § 11702, and accordingly we have jurisdiction to hear this suit. 28 U.S.C. § 1291.

The Filed Rate Doctrine. The starting point is the statute governing what regulated carriers must charge, 49 U.S.C. § 10761, a statute that must be read in terms of the several decisions of the Supreme Court insisting on its mandatory character and its central role in the regulation of interstate carriers. The statute, set out in greater fullness above, provides that a regulated carrier shall provide transportation or service "only if the rate for the transportation or service is contained in a tariff that is in effect under the subchapter. That carrier may not receive or charge a different compensation for that transportation or service than the rate specified in the tariff. . . ." As the Supreme Court construed the statute over 75 years ago: "under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext." *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97, 35 S.Ct. 494, 495, 59 L.Ed. 853 (1915). Compliance with the requirement has been found to be "utterly central" to the administration of the Interstate Commerce Act. *Maislin*, 110 S.Ct. at 2769.

An exception is written into section 10761 itself for what is "otherwise provided in this subchapter." What is otherwise provided by separate statutory provisions are that the rates may not be unreasonably discriminatory, 49 U.S.C. 10741; must be reasonable, 49 U.S.C. § 10701; and may be on credit under regulations issued by the ICC, 49 U.S.C. § 10743. The ICC also has the initial responsibility of determining if a rate is unreasonably discriminatory or unreasonable, or if "the practice" of a carrier, as distinct from a rate, is unreasonable, 49 U.S.C. § 10704(b)(1). The interplay of the last statute with the filed rate doctrine was at issue in *Maislin*, which reaffirmed the primacy of the filed rate doctrine. *Id.* at 2768.

What led to *Maislin* was that the ICC had interpreted the Motor Carrier Act of 1980, Pub.L. No. 96-296, 94 Stat. 793, to justify a substantial departure from the filed rate doctrine. The Motor Carrier Act deregulated interstate trucking in many ways. *Maislin* at 2764. The ICC concluded that negotiated rates between a carrier and a shipper were now permissible even though the negotiated rate was not filed with the Commission. The negotiated rate was always lower than the filed rate—the negotiated rate was intended to meet competition. As long as the carrier stayed in business, no one objected; a carrier would not offend its customers by reneging on the deal. But when a carrier went out of business and a trustee in bankruptcy replaced it, the situation changed radically. The trustee was interested only in collecting the maximum amount legally possible; the trustee was not constrained by the desire to preserve the confidence of the carrier's customers. The trustee was in the position to denounce the negotiated,

unfiled rate as illegal and to insist on the payment of the higher filed tariff.

Such was the case in *Maislin*. From 1981 to 1983 a carrier had negotiated rates with shippers that were below its filed rates; the negotiated rates were never filed; the carrier entered bankruptcy; the trustee sought to recover from over one thousand shippers the undercharges, i.e., the difference betwen the filed rates and the negotiated rates. One shipper, who was sued for $187,923.26 of undercharges, defended by claiming that the carrier's practice of seeking the full amount was unreasonable and that the filed tariff was unreasonable. The district court referred these issues to the Commission, which held that the trustee's attempted collection was an unreasonable practice inasmuch as the shipper had in good fiath relied on the negotiated rate. Back in the district court, the ICC's ruling was given effect, and the Eighth Circuit affirmed, holding that there was no provision in the Interstate Commerce Act "elevating" the filed rate requirement over the requirement of reasonableness. 879 F.2d 400, 405 (8th Cir.1989). The Supreme Court reversed, adhering the primacy of the filed rate doctrine. *Maislin* at 2768.

In the course of reaching this conclusion, the Court rejected arguments that would have led to the opposite result and were vigorously pressed by the dissent. First, it was argued that the ICC was the agency charged with the administration of the Interstate Commerce Act and with its harmonious interpretation as a whole; deference was due its interpretation. *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). Second, it was argued that the filed rate requirement was a vestige of an earlier

era where policing of the vast power of the railroads was the thrust of the regulatory scheme; the Motor Carrier Act of 1980 had changed all that as far as trucking was concerned; vigorous competition among the carriers was now to be encouraged. Third, it was contended that the only beneficiaries of the Court's rigid insistence on the old requirement would be the bankruptcy bar and the unsecured creditors of bankrupt carriers, to say the least a strange policy result and contrary to the usual consideration given to equity in the administration of a bankruptcy.

The Court was adamant. The statute as construed by the Court put the filed rate requirement first. The agency's ruling could not stand if it derogated from the filed tariff. If deregulation and competition were to have complete sway it was for Congress not the ICC or the courts to repeal the old law, so often construed and enforced by the Court. If a windfall was given to unexpected recipients—so at least the Court implied—it was not the Court's business. Long ago it had determined that shippers were not entitled to equitable defenses against the filed rate. *Texas & Pacific R. Co. v. Mugg*, 202 U.S. 242, 26 S.Ct. 628, 50 L.Ed. 1011 (1906). "Despite the harsh effects of the filed rate doctrine, we have consistently adhered to it." *Maislin* at 2767. The special equitable considerations governing bankruptcy (e.g., He who seeks equity must do equity) were not mentioned but inferentially, as *Maislin* was a bankruptcy case, these equities, too, were subordinated to the filing requirement. In a triumph of doctrinal consistency, the filed rate doctrine ruled the roost.

Transcon's Filed Rate. As already described, Transcon had on file with the ICC the bureau rate setting out its full charges; its discount rate; and the

rules tariff providing that the discounts applied to charges that were paid within 90 days of the date of shipment. Together these filings constituted Transcon's filed rate. None of the filed rates incorporated all the conditions set by the ICC for the extension of credit.

The application of Transcon's filed rate leads (1) to the grant of discounts subject to a condition; (2) to the loss of the discounts when the condition is not met, i.e., payment is not made in 90 days; with the result (3) that the bureau rate governs.

The Impact of the ICC's Credit Regulations. The regulations, the ICC responds, are being ignored. Under the statute, section 10743, credit can be extended by a carrier only if it complies with the regulations. Transcon and the Trustee have not complied with a number of regulations, to wit (1) that the original bill to the shipper carry a notice of the penalty for late payment, 49 C.F.R. § 1320.3(c); (2) that such penalty be applied "only to the nonpayment of original, separate, and independent freight bills and shall not apply to aggregate 'balance-due' claims sought for collection on past shipments by a bankruptcy trustee, or any other person or agent." *Id.* § 1320.2(g)(2)(iii); and (3) new bills asserting the penalty must be issued "within 90 days of the expiration of the authorized credit period." *Id.* § 1320.2(g)(2)(vi).

Transcon did not comply with the regulation requiring the notice in the original bill, and it is too late for the Trustee to remedy this omission. The Trustee has not complied with the regulations requiring new, individual, non-aggregated bills, and he would find it difficult or impossible to do so. As the regulations have not been complied with, so the Com-

mission contends, the Trustee cannot collect the bureau rate.

The ICC's position depends on one further proposition: that the difference between the discount rate and the bureau rate constitutes the "liquidated damages" that the carrier may collect when the shipper-on-credit does not pay on time. 49 C.F.R. § 1320.2 (g)(1)(ii). In the terms used by this regulation, "collection expense charges" are what a carrier collects when the shipper is assessed for overdue freight charges and the difference between the discount and nondiscount rate constitutes the carrier's liquidated damages for this expense. It is the ICC's position that the only authority the carrier has for collecting these liquidated damages is obtained by complying exactly with the preceding ICC regulations on credit.

We need not in this case determine the validity of the ICC credit regulations. We need not, for example, determine whether the difference between discounted and bureau rates can so neatly be turned into liquidated damages; nor need we explore the absence of any reference in the regulations to interest or the meaning of "service charges" which the same set of regulations apparently uses in distinction to "collection charges," *see id.* § 1320.2(e). On such questions, it may well be that deference should be given, as *Chevron* requires, to the agency's expertise. We also do not question that, in general, the ICC has power to enforce its credit regulations by seeking an injunction. 49 U.S.C. § 11702(a)(4) and (a)(6). The ICC has broad powers to shape remedies for the violation of its rules. *I.C.C. v. American Trucking Assns. Inc.*, 467 U.S. 354, 355, 104 S.Ct. 2458, 2459, 81 L.Ed.2d 282 (1984).

The case, however, is different when the ICC seeks an injunction applying its regulations in such a way as to undercut the filed requirement. Then *Maislin* governs. Regulations, however valid in other contexts, cannot furnish the reason for letting the carrier abandon the filed rate. The ICC's interpretation of these regulations to allow such a result then has no greater force than the policy rejected in *Maislin*. Although the Act authorizes the ICC to regulate carrier credit, the filed rate doctrine trumps the manner in which the ICC seeks to regulate carrier credit in this case, just as in *Maislin* it trumped the policy the ICC had adopted pursuant to its statutory authority to determine the reasonableness of a practice. The filed rate requirement, as *Maislin* holds, is controlling.

As *Maislin* points out, "past experience shows that billing clerks and other agents of carriers might easily become experts in the making of errors and mistakes," so as to give lower rates to favored shippers, "while other shippers, less fortunate in their relations with carriers . . . would be compelled to pay the higher published rates." *Maislin*, 110 S.Ct. at 2766-67 (quoting *Poor v. Chicago, B & Q.R. Co.*, 12 I.C.C. 418, 421 *Grain Co.* (1907)). Here, the ICC seeks to enforce its regulations in a way that essentially encourages and endorses such methods of circumventing the filed rate requirement, for it would prevent the Trustee from collecting the bureau rate in accordance with all of its filed tariffs. If allowed to enforce its regulations in this way, "the ICC [would permit] the very price discrimination the Act by its terms seeks to prevent." *Maislin*, 110 S.Ct. at 2768.

The Commission's reliance on *Delta Traffic Service, Inc. v. ADM*, 954 F.2d 721 (5th Cir. 1992), and *Delta*

Traffic Service, Inc. v. Mennen Co., 919 F.2d 134 (3d Cir. 1990), is misplaced. First, both opinions are unpublished, although the district court opinion in the Third Circuit case is published. *See Delta Traffic Service, Inc. v. Mennen Co.*, 730 F.Supp. 1309 (D. N.J. 1990). Second, both involved loss-of-discount provisions adopted by carriers at a time when ICC regulations did not permit such provisions. Transcon's loss-of-discount provision, in contrast, was adopted after the 1988 amendment to the ICC regulations that specifically authorized such provisions.

Going by the filed rate as we must, there is a single filed tariff governing here: the rules tariff providing that the discount lasts only for 90 days after the date of shipment and that timely payment is a precondition of the discount.

There is no need to go beyond this determination of what the operative tariff is. One or two other points, however, are worth mentioning. In oral argument the ICC maintained that "no one reads the tariffs," that is why the ICC's credit regulations required notice by bill. We do not know the accuracy of the ICC's observation although we are instructed by the Supreme Court that "there are commercial services providing up-to-the-minute details of the carrier's rate schedule." *Maislin*, 110 S.Ct. at 2764, n. 12. If a shipper doesn't read the tariff, would the shipper read the regulations? It is fair to suppose that any buyer getting a discount subject to a precondition is aware that there is a full rate to be paid if the precondition is not met and it is fair to put upon the buyer the burden of knowing what the precondition is. The equities here are not necessarily with the late-paying shippers. They enjoyed the ex-

tension of credit by the carrier while the carrier became insolvent. It is not unfair to make them now contribute to the payment of the carrier's unsecured creditors. But, under *Maislin*, we need not balance equities. The filed rate is decisive.

Not exactly for the first reason given by the district court, that the credit regulations are "invalid," do we affirm its judgment, but because the Commission's regulations cannot be enforced in this way to undercut the filed rate.

The Coded Rates. We also do not adopt the second reason given by the district court that the coded discount rates were invalid because publication of the customer names was required. If that reason held, the vast majority of Transcon's discount rates, being coded, would be unlawful, and the Trustee could believe he could collect the bureau rate as the only filed rate that was lawful. In invalidating the coded discount rates, the district court drew no conclusions as to what the Trustee was free to do beyond denying the ICC the injunction it sought. The Trustee, however, has interpreted the invalidation of the coded rates as the equivalent of a declaration that the only rate in effect was the bureau rate. Following the district court's decision, the Trustee informed shippers who had already paid in timely fashion the original amount billed that "the discount you were granted was and is invalid," adding that the full amount must now be paid.

We must admit to being troubled by the ICC's policy of allowing codes alone to identify shippers. Such a practice leads to secrecy, and secrecy makes possible discrimination in rate-setting. Yet we cannot agree with the district court's decision to address the valid-

ity of the scheme because Transcon, as a carrier, lacks standing to challenge the lawfulness of its own rates, for two reasons: (1) a carrier cannot obtain reparations from a shipper for undercharges; (2) a carrier's interests are not within the zone of interests protected by the Act. These reasons are more fully elaborated below.

(1) In the jargon surrounding the Act, a "legal" rate is the *filed* rate. *See Maislin*, 110 S.Ct. at 2767 ("the filed rate is the *legal* rate"). But a rate is not immune from challenge simply because it is filed; that rate must also comport with the other provisions of the Act. Any challenge to a filed rate is a challenge to its "lawfulness." *See Maislin, id.; Arizona Grocery v. Atchison Ry.*, 284 U.S. 370, 384, 52 S.Ct. 183, 184, 76 L.Ed. 348 (1932); *Chicago, M., St. P. & P.R. Co. v. Alouette Peat Products*, 253 F.2d 449, 455 n. 5 (9th Cir. 1957); *Southern Pacific Transp. Co. v. San Antonio, Tex.*, 748 F.2d 266, 273-74 (5th Cir. 1984). In the technical language of the Act, an attack on the "legality" of a rate means an allegation that the rate is not a *filed* rate. As *Maislin* proves, a carrier has standing to challenge the legality of its own rates.

But it is another matter for a carrier to challenge the lawfulness of its own filed rates. A court has no power to declare a filed rate unlawful and award damages to a carrier for the past application of the rate by the carrier. A shipper may pay the filed rate, sue because the rate was unlawful, and recover reparations. *Maislin*, 110 S.Ct. at 2767. No similar right exists for a carrier to recover damages because of its own illegality.

It is established law that "the shipper may receive reparation for overpayment while the carrier can

never be made whole after underpayment." *Burlington Northern, Inc. v. United States*, 459 U.S. 131, 141-42, 103 S.Ct. 514, 521-522, 74 L.Ed.2d 311 (1982). The only exception noted by the Court is a provision for a carrier to recover a portion of a rate that was suspended by the Commission but later found to be reasonable. 4 9U.S.C. § 10707(d)(2). "[A] carrier may receive reparations *only* when underpayment was the result of the Commission's suspension of a tariff." *Union Pacific R. Co. v. Nevada Power Co.*, 950 F.2d 1429, 1434 n. 6 (9th Cir. 1991) (emphasis added). This court has no power to grant Transcon reparations for its own unlawfulness.

Under Article III of the Constitution, federal courts may only adjudicate actual "cases" or "controversies." A "core component" of the federal doctrine of standing is "derived directly" from this constitutional limitation. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). One aspect of the "constitutional component of standing doctrine" is that the unlawful conduct complained of by a litigant must appear "likely to be redressed by the requested relief." *Id.* But no federal court can grant Transcon or the Trustee any effective relief for the unlawfulness they allege. Transcon and the Trustee therefore lack standing to bring a claim alleging the unlawfulness of their own filed rates. Federal courts are "without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971).

The Bankruptcy Act authorizes the trustee to act on behalf of creditors for the purpose of recovering

preferential or fraudulent transfers made by the bankrupt, *see, e.g., In re Leasing Consultants, Inc.*, 592 F.2d 103, 110 (2d Cir. 1979). No such authorization exists for the trustee to fit "into the overshoes of the bankrupt's creditors," 592 F.2d at 110, to challenge rates Transcon has filed in an effort to collect higher rates. *See In re Ozark Restaurant Equip. Co., Inc.*, 816 F.2d 1222, 1224-1226 (8th Cir. 1987), *cert. denied*, 484 U.S. 848, 108 S.Ct. 147, 98 L.Ed.2d 102 (1987).

(2) The doctrine of standing also includes "several judicially self-imposed limits on the exercise of federal jurisdiction." *Allen*, 468 U.S. at 751, 104 S.Ct. at 3324. One of these "prudential" standing limits requires that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee." *Data Processing Service v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). The publication requirement of the statute is designed to protect shippers against discrimination and to protect carriers against the competitive disadvantage they may suffer if other carriers discriminate. It is not designed to allow carriers, or their successors in bankruptcy, to repudiate their own filed rates in hopes of collecting a higher rate. Thus, the interest that the Trustee asserts does not fall within the zone of interests that the Act protects. *See, e.g., Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411, 416 (8th Cir. 1976) (carrier lacked standing to challenge ICC order on environment grounds).

The Trustee may say, if I can collect the bureau rate on overdue charges, why cannot I collect the

bureau rate if the alternative tariff is held illegal? The answer is the filed rate doctrine. When the Trustee collects on the overdue charges, he follows the filed rate, *i.e.*, the rules tariff. When the Trustee seeks to collect the bureau rate in lieu of the allegedly unlawful discount rate, he leaps over the filed rate. He may not do so.

The Trustee cannot make an end run around the limitations on the carrier's remedies and the Act's zone of interests by having a court find one filed rate unlawful and then moving to collect the other filed rate that still stands. To permit such a process would be to stand the Interstate Commerce on its head and give federal courts an authority over rates that has never been conceded by a statutory scheme where "court-ordered relief interferes with the delicate balance the Act strikes between the competing interests of shipper and carrier." *Burlington Northern*, 459 U.S. at 140, 103 S.Ct. at 520.

The Trustee's Attack On Transcon's Entire Discount Scheme.

It will be recalled that the Trustee's first affirmative defense was that Transcon's "entire discount scheme" was "an unlawful secret rebate scheme." That contention was not adopted by the district court. The Trustee returns to it in his brief and oral argument on appeal, in effect tying it to his attack on the coded discount tariffs.

The Commission in 1984 ruled that rates could be filed by carriers in terms of individual named shippers and that such rates were not per se unlawfully discriminatory. *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984) ("Named Shipper"). In defense of this ruling the Commission observes

that the Interstate Commerce Act does not require that all shippers be treated identically but simply prohibits "unreasonable discrimination." 49 U.S.C. § 10741(b). The Commission goes on to argue that individual case-by-case examination of alleged discrimination is necessary because "carriers and shippers have unique requirements and opportunities" and there must be competitive injury to a shipper before discrimination is demonstrated.

The Trustee attacks this policy, citing earlier rulings of the Commission, *e.g.*, *California Commercial Ass'n v. Wells Fargo & Co.*, 14 I.C.C. 422 (1908) and judicial precedent, *e.g.*, *Arizona Grocery Co. v. Atkinson Ry.*, 284 U.S. 370, 52 S.Ct. 183, 76 L.Ed. 348 (1932). The Trustee's basic argument is that a common carrier cannot operate by means of individually negotiated rates. The Trustee's argument is tied to the issue of the coded rates, because the codes came into use only as the ICC permitted rates with named shippers to be filed in 1984. Prior to this time, there was no point in identifying the shippers as the tariff was general. The secret code, the Trustee contends, is a badge of the secret rebate constituted by the named shipper rate.

The amount at stake if the Trustee's position should prevail is very large. The ICC estimates it at $1 billion. The Trustee informs us that he intends to sue "several hundred thousand shippers" by May 1992. The deadline is presumably set by the three-year statute of limitations on claims for transportation charges. 49 U.S.C. § 11706(b).

We decline to decide the lawfulness of the individual discount rates for the same reasons that the

Trustee's complaint about the secret code is not relevant to this case. Transcon and the Trustee lack standing to raise this claim. They do not possess the sort of interests the Act was meant to protect and the court, by invalidating the discount rates because they were coded or because they were individual, could afford no remedy to the Trustee. The court lacks power to award the carrier damages retroactively or to circumvent the restriction on its power by striking one filed rate and authorizing the Trustee to collect the rate left standing. No retroactive remedy exists for a carrier that has filed an unlawful rate.

Conclusion. The district court erred in holding the credit regulations of the ICC invalid and the coded discount rates illegal. The case is REMANDED to the district court for entry of an injunction against the Trustee collecting any amounts on the grounds of the unlawfulness of coded rates or the unlawfulness of individual discount rates. The judgment in favor of the Trustee as to collection of the bureau rate on overdue accounts is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ICC

v.

TRANSCON LINES

October 23, 1992

ORDER

The following amendment is added to the opinion filed on June 17, 1992.

At slip opinion page 7092, after fifth line, insert the following as a new paragraph:

> The Bankruptcy Act authorizes the trustee to act on behalf of creditors for the purpose of recovering preferential or fraudulent transfers made by the bankrupt, *see, e.g., In re Leasing Consultants, Inc.*, 592 F.2d 103, 110 (2d Cir. 1979). No such authorization exists for the trustee to fit "into the overshoes of the bankrupt's creditors." 592 F.2d at 110, to challenge rates Transcon has filed in an effort to collect higher rates. *See In re Ozark Restaurant Equip. Co., Inc.*, 816 F.2d 1222, 1224-1226 (8th Cir. 1987), *cert. denied*, 484 U.S. 848 (1987).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ICC

v.

TRANSCON LINES

December 10, 1992

ORDER

The opinion filed June 17, 1992 and amended October 23, 1992, is further amended as follows:

Replace the sentence on pages 12779-80 ("The Trustee cannot make an end run . . .") with the following:

> The Trustee seeks to characterize his challenge to Transcon's rates as one of legality rather than lawfulness—that is, he argues that Transcon's coded tariffs were not duly filed because neither the Commission nor the public could determine from within the four corners of the tariff the identify of the shipper receiving each coded discount. Without deciding whether the Act requires publication of customers' names, rather than merely of the rates they receive, we reject

> this argument. If coded rates are not duly filed and published rates, then Transcon's rates had not been filed. Without rates on file, the Trustee has no basis for collecting undercharges. *Wonderoast, Inc.—Petition for Declaratory Order—Certain Rates and Practices of Transportation Systems International, Inc.*, 8 I.C.C. 2d 272, 278 (1992). We reject the invitation to disaggregate Transcon's rates, invalidating the discounts and leaving the Trustee to collect undercharges on the basis of a truncated filing never meant to stand alone.

Then, following the rest of the paragraph at the top of page 12780, add, after the citation to *Burlington Northern*, one sentence:

> It is the Commission which has discretion to craft appropriate remedies when the rates on file with it do not themselves comport with the law. *Maislin*, 497 U.S. at 133 (*citing ICC v. American Trucking Assns., Inc.*, 467 U.S. 354, 364-65 (1984)).

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE IRVING HILL, JUDGE PRESIDING

CV 91-5036-IH

INTERSTATE COMMERCE COMMISSION, PLAINTIFF

vs.

TRANSCON LINES, ET AL., DEFENDANTS

TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

NOVEMBER 25, 1991

Appearances:

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and

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[4]

Los Angeles, California; Monday,
November 25, 1991

(10:30 A.M.)

THE COURT: Okay, Mr. Clerk. We will get to Transcon at this point.

THE CLERK: Item Number Five, CV 91-5036-IH, Interstate Commerce Commission versus Transcon Lines.

Counsel, would you announce your appearances, please.

THE COURT: Let's see. We will take the appearance for the plaintiff first.

MR. DAY: Your Honor, I'm Stephen Day with the Interstate Commerce Commission. I understand my application for pro hac vice was approved by the court.

THE COURT: I don't remember. I think I signed some in this case. Will you be handling it, Mr. Day?

MR. DAY: Yes, Your Honor, I will. And with me is Patricia Burke Kuhlmann, who is an Attorney with the Interstate Commerce Commission.

THE COURT: Wait. Let me get all these appearances. Patricia Burke Kuhlmann. That's this lady?

MR. DAY: Yes.

THE COURT: And both of you are from I.C.C.'s legal staff in Washington?

MR. DAY: We are with the Office of Compliance and Consumer Assistance, Your Honor.

[5] THE COURT: Of I.C.C.?

MR. DAY: Yes, Your Honor.

THE COURT: Okay. Out of Washington?

MR. DAY: I'm in Seattle, Washington and Patricia Kuhlmann is in Washington, D.C.

THE COURT: All right. And you'll be handling it, Mr. Day?

MR. DAY: Yes, Your Honor.

THE COURT: Very well.

MR. DAY: Also present with us today is Henri Rush, who is Deputy General Counsel for the Interstate Commerce Commission.

THE COURT: That's this gentleman over here?

MR. DAY: Yes, Your Honor.

THE COURT: All right, Mr. Rush. You are welcome as is Ms. Kuhlmann. And you may sit at counsel table.

And is there someone here from the U.S. Attorney's Office as well?

MS. LUYMES: Yes, Your Honor. Jan Luymes from the U.S. Attorney's Office here. I will be acting as local counsel as a contact point for the court.

THE COURT: Very well. All right. For the defendant now.

MR. ASHWORTH: Yes. Good morning, Your Honor. Christopher Ashworth of Garfield, Tepper, Ashworth & Epstein [6] for the defendant trustee Leonard L. Gumport.

THE COURT: Okay. This action was just recently filed. The filing date was September 18th. The answer was filed October 8th.

Now the court is confronted with reciprocal motions by the two parties for summary judgment. Each of those motions seeks total judgment as against the other. Am I right in that?

MR. DAY: Yes, Your Honor, that is correct.

MR. ASHWORTH: Yes, Your Honor.

THE COURT: All right. Since plaintiff is seeking an injunction, the judgment if granted to plaintiff will be an injunction, and plaintiff has lodged

under date of November 8th their proposed judgment, although it isn't called a judgment. It's called a proposed order.

Now, I must ask you right at the threshold, may I assume by virtue of the existence of these reciprocal motions that both sides agree that this matter is ripe for adjudication one way or the other for the granting of a judgment one way or the other at the end of today's hearing?

Mr. DAY: We both agree to that.

MR. ASHWORTH: Yes.

MR. DAY: We have discussed that, Your Honor.

THE COURT: All right. This means, of course, that you're both agreeing that there are no bona fide disputes of [7] material fact that would preclude the court from granting a judgment to one side or the other; right?

MR. DAY: That's correct, Your Honor.

MR. ASHWORTH: Yes.

MR. DAY: We both agreed to that.

THE COURT: All right. The issue presented then is one of law alone.

MR. DAY: Yes, Your Honor.

THE COURT: Correct, Mr. Ashworth?

MR. ASHWORTH: Yes, sir.

THE COURT: All right. As I understand it, and I will ask you shortly to respond, the undisputed facts are as follows. The defendant Gumport is the trustee in bankruptcy in a Chapter 7 bankruptcy proceeding of a corporation called Transcon Lines. When it was active it was a large I.C.C. carrier.

Pursuant to the requirements of the I.C.C. statute, Transcon filed rates for its services. The original filings were for every class of goods and provided a single rate for a single destination or service.

Thereafter, Transcon filed pursuant to the statute certain discount rates which had the effect of changing the rates previously filed for certain customers and which provided substantial discounts from the previously-filed general rate for the benefit of those certain customers.

[8] I.C.C. accepted the original general filings and also accepted these later discount filings.

The discount filings contain a provision for loss of the discount in the event payment was more than 90 days late. Put another way, that provision said that if payment was more than 90 days late, the shipper would have to pay the original and higher general filed rate.

Since the bankruptcy, the trustee is attempting to collect from shippers the general filed rate on many shipments. A total of at least 15 million dollars allegedly due is sought on the theory that the discounted rate was lost by failure to pay within the 90-day period.

The trustee, defendant in our case, is attempting to collect these sums in a number of lawsuits that are pending in this district. One of them, a case called Transcon versus Winfield, is pending in my court, case CV 91-1418-IH.

Collection efforts without litigation or preparatory to litigation are also going on in addition to the lawsuits already filed.

The judgment sought by—let me stop here. If I have misstated any of those facts, I would be happy to hear your view about that now. From Plaintiff?

MR. DAY: No, Your Honor. I don't think that's a mistake.

THE COURT: All right.

[9] MR. ASHWORTH: You're doing fine so far, Your Honor.

THE COURT: I didn't ask you that. I only asked you whether I had misstated the facts.

MR. ASHWORTH: I agree with your characterization.

THE COURT: A cheering section is not often available to a judge and I sure don't want any. Okay. You can do that down at the Coliseum at the next UCLA/SC football game.

The judgment sought by the plaintiff I.C.C. in this case—the judgment that will be granted if they win today—is a judgment to prevent the trustee from attempting to collect such additional sums by enforcement of the loss of discount provision of the filed rates.

Plaintiff's case is limited to that attempt and the relief sought, the injunction, would be limited to that practice and that collection effort; right?

MR. DAY: Yes, Your Honor, that is correct.

THE COURT: All right. The reason this is important, Mr. Day, is the language in the complaint seems in some places broader than this problem of enforcing the loss of discount provision.

And if you look at the proposed order—would you? —page 2, lines 13 through 20.

MR. DAY: Page 2, Your Honor?

THE COURT: Yes. Lines 13 to 20. You see there a paragraph that could be read as being broader than stopping [10] the loss of discount collection efforts. That's why the matter was raised specifically with you. And you have told me that your intent is to attack the attempt to collect on the loss of discount; right?

MR. DAY: Yes. The language is broader, Your Honor, but as the papers have proceeded here, I think that we have refined the issue down to just the loss of discount provision and whether or not that can be done.

THE COURT: Okay. Thank you. Let's go ahead. I want to pose the problem that these reciprocal motions raise and discuss the contentions of the two sides. In analyzing this problem, we start in my view with the filed rate doctrine as enunciated in the interstate Commerce Act at 49 U.S. Code, Section 10761(a).

That section of the statute provides in essence that a carrier subject to the I.C.C. statute and regulations and subject to regulation by the I.C.C. shall provide transportation or service only for the rate that is contained in a tariff which is in effect under the statute.

It goes on to provide in the second sentence of the that statutory section that the carrier may not charge or receive any different compensation for that transportation or service than that specified in the filed rate.

The position of the trustee is in my view fairly simply stated. The trustee points to the loss of discount [11] provision that is incorporated as a part of the filed tariff for every bill that is the subject of his collection effort.

We find this in Exhibit 1 of the Trustee's appendix of exhibits that was filed October 29, 1991. Perhaps you would be good enought to take a look at Exhibit 1, page 1-03. Do you find that? Take your time.

MR. ASHWORTH: Defense counsel has it before him, Your Honor.

THE COURT: Okay. We'll see—

MR. DAY: Your Honor, it's Exhibit 1. What page?

THE COURT: Exhibit 1, page 1-03.

MR. DAY: Yes, Your Honor, I have it.

THE COURT: You have it. All right. At the top of that page, gentlemen, is the loss of discount provision that is at issue. The loss of discount provision seems to be a part of the filed tariff in every situation where the trustee is attempting to collect further monies.

That loss of discount provision says in relevant part as follows, and I am quoting:

> "Discounts . . . and then three dots—shall apply only when tariff charges are paid within 90-calendar days from date of shipment," close quote.

Incidentally, the I.C.C.'s factual presentation to me also contains the same loss of discount provision of filed [12] tariffs. I.C.C. has it as Exhibit 12 to their appendix of exhibits filed November 8, 1991.

And in the I.C.C. version of this at pages 43 through 46, there is a file stamp showing I.C.C.'s receipt of these filed tariffs as of April 25, '88 and another one showing receipt as of June 6, '88.

Continuing with the analysis of the trustee's position. The trustee is saying, therefore, all I want to do is collect what is due, because by paying the discounted charges too late, after the 90-day period, the shipper in question lost the benefit of the discount provision. The benefit was lost pursuant to the language of the filed tariffs, which the court has just read.

Now for I.C.C.'s position. I.C.C. seems to say that's all true. And if you read the loss of discount provi-

sion alone, the discount might well be considered lost. But says the I.C.C., you cannot read it alone.

I.C.C. says that the discounts cannot be taken away from the shipper except in connection with and in conformity with regulations, which we the I.C.C. have published with respect to credit granted to shippers. Those regulations, the I.C.C. says, are found at 49 C.F.R. 1320.

Continuing with the I.C.C. position. These credit regulations bar enforcement by the trustee of the loss of discount provisions of the tariff. Enforcement is barred [13] because under those regulations if the carrier doesn't send revised bills or notification to the delinquent shipper within 90 days after the expiration of, quote, "the authorized credit period," close quote, the discount provisions cannot be enforced.

The term "the authorized credit period," by the way, is defined elsewhere to mean 15 days from the date of shipment. The definition of that term is found at 49 C.F.R. 1320.2G2VI—six being roman.

The I.C.C. also says that enforcement of the loss of discount provision is barred to the trustee by two other provisions of its regulations. The next one they rely on is 49 C.F.R. section 1320.3C. That one in essence says that carriers must include certain information on their freight bills. The regulation contains examples of what must be said on the freight bills.

In lieu of reading the whole regulation, I would describe those requirements generally as requiring the bills to say, quote, "failure to pay these charges timely may subject you to penalties," close quote. And I.C.C. says that information was not on the freight bills in issue.

The third and last of the regulation provisions that I.C.C. relies on is 49 C.F.R. 1320.2G2III—the last three being roman or three "I's." I guess that's not roman. Three "I's. And the other one I just discussed being two "I's."

[14] In any event, the last one here, 2G2III, says in essence that the trustee in bankruptcy—mentioned in haec verba—the trustee in bankruptcy may not collect aggregate balance due claims unless there have been independent and separate bills.

I must ask the I.C.C. one question now please, Mr. Day. Come to the podium. Assuming that the original freight charges were embodied in independent and separate bills, what meaning does the commission attach to the, quote, "independent and separate bill" provision of this regulation?

Are you saying that a lawsuit cannot be instituted to collect the loss of discount amounts arising out of any shipments? That a separate lawsuit has to be filed for each one? Are you saying that a separate billing for the loss of discount has to be filed for each shipment? What is your position?

MR. DAY: No, Your Honor. Not a separate lawsuit. The rule was adopted to make sure that carriers would not wait a long period of time and then batch up a number of these undercharges and present them to the shipper two to three years later.

THE COURT: I don't follow that. Let's assume, and I think it's a valid assumption, that the original shipment and the invoice for it was a separate bill.

MR. DAY: Yes.

[15] THE COURT: Okay. Now are you saying some other and different bill has to be sent under this provision?

MR. DAY: Yes, Your Honor.

THE COURT: What other and different, separate bill?

MR. DAY: It would be a bill that would indicate that the additional amount is now due for failure to pay within the first 90-day period. In other words, the first bill, for instance, would be $100 on the discounted amount, and then after the expiration of 90 days and failure to pay, the carrier must rebill.

THE COURT: Let's assume arbitrarily that the discount given and now lost was $20. You have to send a new and separate bill? When?

MR. DAY: Yes, Your Honor. Within that 90-day period to indicate that there is a loss—

THE COURT: Within the 90 days? You don't lose it until 90 days have expired. So what's this abount sending a separate bill within the 90-day period?

MR. DAY: It is my understanding, Your Honor, that the bill must state that you have lost the discount and this is the total amount you now owe. That was the purpose of the rule.

THE COURT: Well, when must that separate bill be sent?

MR. DAY: Your Honor, the rules does say within 90 [16] days after expiration of the authorized credit period.

THE COURT: Well, it's 90 days after the 90 days which caused the loss of discount; is that right?

MR. DAY: No, Your Honor. It's after the authorized credit period which Your Honor has defined.

THE COURT: That's 15.

MR. DAY: Within the 15.

THE COURT: Within 90 after 15; is that what you're saying?

MR. DAY: That's correct.

THE COURT: And most of that 90 is still within the 90 days when they can get the discount; right?

MR. DAY: I don't know if that's correct.

THE COURT: I don't follow this very well. I don't think it's going to be critical to the decision. But I ask you only because the papers did not make this clear. Have a seat.

As I understand the trustee, the defendant's response to this position by I.C.C., he says it is quite true that the requirements of these regulations have not been met. But, says the trustee, the regulations do not apply and cannot apply because they are not valid. They are not valid, he says, because they purport to change or derogate from statutory provisions which bind the bankrupt and govern the matters at issue.

[17] For this position the trustee relies primarily on the recent Maislin, M-a-i-s-l-i-n, decision in the Supreme Court. Maislin Industries versus Primary Steel Incorporated, 110 Supreme Court 2759, decided in 1990.

Maislin must be carefully examined. There the conflict was much the same as it is here. We had a bankrupt carrier there suing the shipper for the full published tariff rate. The services had been performed some time back, and the carrier had billed that customer at a discounted rate under a previously-struck agreement.

The customer had paid the charges billed in full. The District Court in Maislin stayed the proceedings in the District Court and referred the matter to the I.C.C. The I.C.C. rendered its judgment in favor of the shipper under an I.C.C. policy that was published in a formal manner, which policy prevented the col-

lection of new charges. New charges being those above what was billed but within the original filed rate. It prevented the collection of those so-called new charges on the ground that collecting them constituted a, quote, "unreasonable practice," close quote.

I.C.C. had some statutory authority to prevent unreasonabe practices. The Supreme Court held that the enforcement of the I.C.C. policy undermined the statutory filed rate doctrine and could not affect the obligation of the shipper to pay the full rate under the filed rate doctrine.

[18] Now, I want to tell you my tentative view of this case. In my tentative view Maislin should govern this case as well and its rationale should govern. I see no basis for arguing that there is any legal difference in terms of affecting the validity of the filed rate doctrine between a formal and formally published I.C.C. policy which he had in Maislin and a formal and published I.C.C. regulation or regulations which we have here.

If either violates the statutory command of the filed rate doctrine, Maislin teaches that it must yield and it is invalid.

For the purpose of interpreting Maislin and determining what the "filed rate" is, as the term is used in the filed rate doctrine, I believe that the defendant trustee here is correct as it defines that term. Defendant defines the term "filed rate" to include all of Transcon's tariffs including class rates, bureau rates, rules tariffs, and discount rates.

Now, I would like to hear from you, Mr. Day, whether you take issue with that definition of the term "filed rate."

MR. DAY: Your Honor—

THE COURT: Just that question.

MR. DAY: Just that question. No, I don't take issue with that at all.

THE COURT: Okay. Although my tentative decision [19] enunciates what I believe is a clear and strong basis for granting defendant's motion and denying plaintiffs', I want to note for the record that the defendant trustee has enunciated in his motion a second, an alernative ground for it. The defendant argues as follows as to this alternative ground.

If the trustee says for any reason the filed rate doctrine and the Maislin rationale is held not applicable to the loss of discount provision and is held to be not a proper basis for dismissing the action, there is a separate second basis.

The argument for the second basis goes this way. Transcon's discount rates were never filed with the name of the customer to whom they applied clearly revealed in the rate itself. For example, if you will look at page 24 of defendant's points and authorities—and tell me when you have it.

You really don't have to wait for it because you know these papers. Let me tell you what it says. One of the customers is coded as being 139779, Number 139779, and others are like that. Defendant takes the position that the customer being referred to by that number was never disclosed even to the commission.

The trustee says that he has in his office at this point a list of which customers have what code numbers in these rate filings and he tells me, the trustee does, that [20] this particular code number 139779 applied to Premier Pump and Pool Products.

Defendant argues that that kind of a rate which keeps the customer's name hidden from competitors and from the commission is illegal. It is illegal, says

defendant, because there is a publication requirement in 49 U.S.C. Section 107762A1.

The language of the statute does not explicitly require a customer's name to be shown when a rate is applicable to only one customer, but we do have case law that does impose that requirement.

The case is one from a district court that was affirmed in the Seventh Circuit and in the U.S. Supreme Court. I believe the trustee has cited it. The case is U.S. versus Chicago and AR Company, 148 Fed 646, going back to 1906, affirmed by the Seventh Circuit in the next year, 156 Fed 558 and by the Supreme Court in 1908 212 U.S. 563.

The District Court opinion which was affirmed does utilize a holding that it violates the publication section of the statute not to name the customer in such a situation.

Now, I am aware that the authority cited is old. But in my view the authority nevertheless has the ring of persuasion about it. And I therefore would tentatively adopt this as a second separate, different and alternative ground for the tentative decision.

[21] The basic policy of the I.C.C. Act which is against discrimination by carriers as between customers is such and so strong that the publication section should be read to require the name of the customer to be disclosed when the carrier is attempting to give a certain customer a discounted rate.

A competitor of that customer who is thus being discriminated against could conceivably do something about it if he knows the name of the customer being benefited, if he knows that his competitor has the benefit of a separate lower rate. But when that competitor is kept in the dark by the use of coded numbers, his remedies are far less effective.

Now, there is a useful decision about the publication requirement and the public policy behind it that I think also supports this alternative ground. The case is called Regular Common Carrier Conference versus I.C.C., decided by the D.C. Circuit in '86, found at 793 F.2d 376, and the author of that case after writing it got a promotion. He is now Mr. Justice Scalia.

I want to take a break here now for the benefit of the reporter and to conduct some proceedings in a case in which a jury is out deliberating. We will excuse you folks for 15 minutes. You can leave your papers.

Assemble the jury in the box please, Mr. Clerk, and counsel in the case being deliberated, and I'll have something to say to them.

[22] THE CLERK: Please rise. Court in recess.

(Recess taken from 11:00 a.m. until 11:15 a.m.)

THE COURT: I have completed my exposition of my tentative decision. I'll hear from the commission now. How much time do you think you will need?

MR. DAY: I think no more than about 10 minutes, Your Honor.

THE COURT: Excuse me while I make some notes. Hold on one second, please. There are so many papers up here from the case in trial that I am finding it hard to get a pad. Go ahead.

MR. DAY: Your Honor, I would like to start first with the Maislin case. That case involved a situation where the Commission's regulations were trying to give effect to an unfiled rate. We think this case is not ruled by Maislin because we are not seeking to enforce an unfiled rate.

What we are doing and I think precisely the point covered is at footnote 11 in the Maislin case, where it says that none of their prior cases had involved a situation where they ignored the filed rate altogether. But it might be where the facts of the case would have one tariff provision prevail over another tariff provision. And we feel that's what we have here.

We fell that Transcon did attempt to take advantage of the credit regulations the Commission had entered under, [23] 10743 of the Interstate Commerce Act. It was an imperfect attempt and it took their situation from purely one of tariff to one where they chose to extend credit. They didn't have to. We agree with Mr. Ashworth there.

But they did so and in doing so, they become subject to the rules of the Commission. I think it's important to emphasize, Your Honor, that 10743 and the extension of credit was strictly regulated for the same reason that filed rates are: to avoid discrimination among shippers.

And I think that the credit regulations and the credit statute are equally as important as the filed rate. And I think the two statutes, 10761—

THE COURT: If you are arguing that the "regs" you are discussing here have a statutory basis, you can't distinguish Maislin, because the policy had a statutory basis in Maislin too.

MR. DAY: Yes, it did. I think the difference in Maislin though again is that we were trying to give effect to an unfiled rate and I think that really is the key to that case. I think that once we get beyond the fact that there was an unfiled rate in Maislin—and as we agreed here today, we're talking about filed rates.

And so Maislin is really not on all fours with this case even though it involved a bankrupt carrier. There is that factual similarity. But what's different here is that [24] Transcon attempted to use our credit regulations to recoup their collection costs. It was one of the methods they chose. And they did publish a tariff item. We think the item is—

THE COURT: I'm lost a little bit. You say they were attempting to use your credit regulations. They were attempting to use the loss of discount provisions of the rates they filed. Isn't that correct?

MR. DAY: I don't think so, Your Honor. I think that Transcon published that item to meet the changes in the 1988 regulations.

THE COURT: Whatever may have been their motive, it's part of a filed rate; isn't it?

MR. DAY: It is part of the filed rate, Your Honor.

THE COURT: Okay. It's hard to say they are not relying on the filed rate when they are.

MR. DAY: But they're barred from using that provision because they didn't do the rest of the things required for them to use it.

THE COURT: I think I have apprehended the real issue in this case. I think my remarks demonstrate that. And I have indicated to you that in my view the regulations—which are as you say they are and would prevent what is being done—are no more valid as against the filed rate doctrine than was the published policy in Maislin.

MR. DAY: If I could take one more cut at it, Your [25] Honor?

THE COURT: Sure.

MR. DAY: I think what we are talking about is 10762 and 10743, the credit regulation. The credit

regulation or the credit statute—excuse me. The credit statute clearly says that the commission may have rules governing credit. The carriers cannot extend credit except pursuant to those rules.

So what we have done is publish rules concerning credit. Transcon did extend credit and in doing so, it moved into that environment, that regulatory environment, subject to those rules. It can't now come back an dsay, well, we were going to do the rest of the things, but it's imperfect and say, well, but we think that the tariff is the end all/be all to the question.

Once they started into that regulatory environment, they're bound by those regulations and they're barred from cancelling that discount.

THE COURT: Let me ask you before you finish to discuss the second alternative ground also.

MR. DAY: Well, the second alternative ground, Your Honor, is a problem because I think that the trustee cannot be relieved from those discounts unless it comes before the commission and gets relief. It seems that that argument—and we argued this in our brief—but that's really a primary jurisdictional question. The commission must look at that [26] first.

We read the regular common carrier conference case to say that a rate must be—

THE COURT: I'm sorry. Which case again?

MR. DAY: The regular common carrier conference case that Your Honor cited.

THE COURT: Oh, yes. All right. Go ahead.

MR. DAY: We believe that case says simply that a rate must be identified and that's all that was involved in that case.

In this case the rates are identified; albeit, there is a shipper code. There may be commercial—

THE COURT: I don't follow you very well. The second ground rests upon the publication requirements of the statute. Those are statutory. And if rates are illegal, they're illegal; aren't they?

MR. DAY: But the trustee still has to comply with them until they get reliew from the commission initially.

THE COURT: The court cannot adjudicate such illegality. Is that what you're saying?

MR. DAY: I think—well, of course—that's correct, Your Honor.

THE COURT: Well, all right. Now I want to hear from Mr. Ashworth. You might deal with this second ground first.

MR. ASHWORTH: Yes, Your Honor.

[27] THE COURT: Counsel says that this court cannot despite the statutory requirement of publication call any kind of a filed rate illegal. That has to be dealt with by the commission first.

MR. ASHWORTH: I'm happly to deal with that one first. The position of the statutory validity of a regulatory position, or in this case of a rate, is something to which courts always address themselves and they don't need to wait. And the perfect case to give you is Maislin itself.

When it addressed a policy of the commission, it didn't say we factually disagree with the commission. They didn't say they didn't think it through properly or any other thing that normally would go into reversing an I.C.C. decision.

They said the I.C.C. has gone left after the statute and you should have gone right. We have the exact situation here. When Transcon filed a rate—in this

case the 90-day disallowance rule, if you like—that was the rate on file with the commission.

The commission had a statutory power for 30 days or thereabouts—and I confess I don't remember the exact days, but it's 30 days or so—to suspend that rate unilaterally.

THE COURT: So acceptance by the commission was the end of their function. That's what you're saying?

MR. ASHWORTH: That's correct. Once it sits there, [28] it sits there. And now after the cat is out of the bag, although I hate to put Transcon as the bad guy in this. They are not. But once the cat is out of the bag, now the commission says we don't want Leonard Gumport to run around enforcing the filed rate. Because if we had thought about it 10 years ago, we would have done something about it.

THE COURT: All right. Why don't you pass to a discussion of the first enunciated ground and the attempted distinction of Maislin by the commission.

MR. ASHWORTH: Yes. Actually Mr. Day made two arguments, and I think I'll handle them in the order that you suggested and go at Maislin first. And that is that Mr. Day said that the Maislin case did not involve a second filed rate; rather that the negotiated rate between Maisin and its customer was a non-filed, non-published rate.

But that really begs the logical question. The court correctly pointed out during its tentative views that the aggregate of the filed rate is all of the building blocks which go into the filed rate—in this case including the 90-day disallowance provision or the 90-day condition precedent provision.

It is therefore not logically necessary to distinguish on the other hand what may not be enforced against

the carrier. The published rate in respect of any given shipment includes, among other things, the 90-day rule.

[29] So the Maislin case is precisely on point because conceptually and practically it deals with the identical question; i.e., can we have a published regulation or a published policy which operates in derogation of the filed rate doctrine enunciated in Maislin and literally a host of supreme court cases and most important linking the statute itself 49 U.S.C. section 10761(a)? I think the court correctly said that Maislin is what matters here.

THE COURT: Counsel made something of footnote 11. Do you know what that is?

MR. ASHWORTH: Footnote 11 in the Maislin case, if memory serves, Your Honor, says—

THE COURT: He has it there. You might take a look at it.

MD. ASHWORTH: And he is handing it to me just like a gentleman which he has been throughout, by the way.

THE COURT: The standard of presentation here —papers and argument—has been very high and I appreciate it.

MR. ASHWORTH: Thank you, Your Honor.

MR. DAY: Thank you, Your Honor.

MR. ASHWORTH: Yes. Note 11—let me quote it because then it makes it easier for us to deal with and there's a logistical problem which makes this easier. Note 11 says that:

> "None of our cases involving a [30] determination by the I.C.C. that the carrier engaged in an unreasonable practice as required to purchase from the filed rate schedule altogether, comma, instead they are required merely the application of a different filed tariff."

THE COURT: What is the court saying in that footnote?

MR. ASHWORTH: What the court is—thank you, Mr. Day.

What the court is saying in that footnote, Your Honor, is that it is perfectly legitimate for a shipper to say or the commission to say, hold it. We have a second rate. You guys forgot about that tariff and the other tariff you filed in 1916 and you never cancelled it. Hhere is another rate that applies to the same bale of cotton and so this is yet another filed rate. There is a well-developed doctrine of law where you end up with two pieces of filed tariff that seem to speak to the same bale of cotton.

THE COURT: And they're inconsistent.

MR. ASHWORTH: And they're inconsistent with one another. And that's not our fact problem here. That's just not the case. There is just lots of law on that, Your Honor, but it's just not our problem.

[31] THE COURT: Well, thank you. No further argument is necessary. The court now adopts the tentative decision. Summary judgment is granted to defendant. The commission's motion for summary judgment is denied. No legal basis is shown therefore. Legal basis is found to exist for defendant's motion.

I'll do my own judgments here, counsel, but I would like to have a transcript of the proceedings today in open court which I will incorporate by reference. Will you order that, please?

MR. ASHWORTH: Yes. In contemplation of that, Your Honor, the trustee has already authorized me to order a transcript for our expense and we'll do it.

THE COURT: Very well. And I will incorporate it by reference in the judgment.

Thank you again for a good job.

MR. ASHWORTH: With some trepidation I want to mention the related case and you mentioned it earlier. And I say "trepidation," because normally you don't want to hear about other cases. But the Winfield matter is coming up for a motion. There is a motion for summary judgment which has been filed, and it contains an interim order suggested from me that there be a reference to a magistrate for nuts and bolts type of—

THE COURT: I'm sorry. I don't want to talk about a [32] motion in another case.

MR. ASHWORTH: I didn't think you would.

THE COURT: It's hard enough for me to deal clearly and expeditiously with this one and the other matters pending.

MR. ASHWORTH: Then I will back away.

THE COURT: Okay. Thank you.

MR. DAY: Your Honor—

THE COURT: I'm sorry. The matter is at a close. Is there something you have vital unrelated to the decision of the matter?

MR. DAY: Well, Your Honor, with equal trepidation just as a matter of proforma, I wonder if I might ask the court to reconsider the first part of its decision under Maislin.

THE COURT: No. That motion for reconsideration is denied. We'll be in recess.

MR. DAY: Thank you, Your Honor.

MR. ASHWORTH: Thank you, Your Honor.

THE BAILIFF: Please rise. Court is in brief recess.

(Proceedings adjourned at 11:30 A.M.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV-91-5036-IH

INTERSTATE COMMERCE COMMISSION

vs.

TRANSCON LINES, ET AL.

CIVIL MINUTES—GENERAL

Date 12/13/91

PRESENT:

HON. IRVING HILL, JUDGE
R. H. MAZZARELLA, Deputy Clerk

Attorneys present for Plaintiffs:

NO APPEARANCES

Attorneys present for Defendants:

NO APPEARANCES

NO APPEARANCES

PROCEEDINGS: IN CHAMBERS

Re: Plaintiff's Notice of Motion and Motion for Stay, Reconsideration, and Amendment of Judgment

No hearing is necessary.

Said motion has been considered by the court and is denied.

No reply is necessary.

/s/ Illegible
Initials of Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV91-5036-IH

INTERSTATE COMMERCE COMMISSION, PLAINTIFF

v.

TRANSCON LINES, ET AL., DEFENDANTS

SUMMARY JUDGMENT FOR DEFENDANTS AND DENIAL OF PLAINTIFF'S MOTION FOR —— SUMMARY JUDGMENT

[Filed November 25, 1991]

There came before the Court on November 25, 1991 for hearing reciprocal motions for summary judgment. Plaintiff's motion was filed November 8, 1991 and defendants' motion was filed October 29, 1991. Appearances were: For plaintiff, Stephen L. Day, Esq., Patricia Burke Kuhlmann, Esq. and Henry Rush, Esq., all of Washington D.C. and Jan Luymes, Esq., Assistant U.S. Attorney; for defendants, Garfield, Tepper, Ashworth & Epstein by Christopher Ashworth, Esq.

Counsel for both sides agreed that the matter was ripe for summary judgment, i.e., that there was no bona fide dispute of material fact to preclude judgment for one side or the other and the sole issue was as to a matter of law and that summary judgment could properly be entered for one side or the other at this time.

The Court, having considered the evidence and the points and authorities filed in support of each motion and in opposition thereto, and having heard argument, announced that plaintiffs motion for summary judgment would be denied, plaintiff not having shown legal entitlement thereto. The Court further announced that defendants' motion for summary judgment would be granted, defendants having shown legal entitlement to the grant thereof.

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Plaintiff's motion for summary judgment is denied.

2. Defendants Transcon Lines, a corporation, and Leonard Gumport, Chapter 7 Trustee, shall have judgment against plaintiff Interstate Commerce Commission with costs of $————————. Plaintiff Interstate Commerce Commission shall take nothing by its complaint against defendants.

3. A transcript of the procedings in open court on November 25, 1991, is ordered filed when produced. It is incorporated herein by reference. The transcript shall constitute the Court's further findings of fact and conclusions of law as well as a statement of the Court's reasons.

4. The Clerk shall transmit a copy of this judgment by U.S. mail to al counsel of record.

DATED: November 25, 1991.

/s/ Irving Hill
IRVING HILL, Judge
United States District
Court

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-55036

DC# CV-91-5036 (Tx)

INTERSTATE COMMERCE COMMISSION,
PLAINTIFF-APPELLANT

vs.

TRANSCON LINES, a corporation; LEONARD L. GUMPORT, Chapter 7 Trustee, DEFENDANT-APPELLEE

[Filed November 25, 1992]

Before: BOOCHEVER, NORRIS and NOONAN, Circuit Judges

The panel as constituted in the above case has voted to deny the petitions for rehearing filed on July 6, 1992, August 3, 1992, and to reject the suggestions for rehearing en banc.

The full court has ben advised of the suggestions for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing filed on July 6, 1992, and August 3, 1992 are denied, and the suggestions for a rehearing en banc are rejected.

APPENDIX G

Title 49, United States Code

§ 10743. Payment of rates

(a) Except as provided in subsection (b) of this section, a common carrier (except a pipeline or sleeping car carrier) providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under this subtitle shall give up possession at destination of property transported by it only when payment for the transportation or service is made.

(b)(1) Under regulations of the Commission governing the payment for transportation and service and preventing discrimination, those carriers may give up possession at destination of property transported by them before payment for the transportation or service. The regulations of the Commission may provide for weekly or monthly payment for transportation provided by motor common carriers and for periodic payment for transportation provided by water common carriers.

(2) Such a carrier (including a motor common carrier being used by a household goods freight forwarder) may extend credit for transporting property for the United States Government, a State, a territory or possession of the United States, or a political subdivision of any of them.

§ 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission un-

der chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

(b) The Commission may grant relief from subsection (a) of this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contact carriers.

(c) This section shall not apply to expenses authorized under section 10751 of this title.

§ 10762. General tariff requirements

(a) (1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates established under this chapter for transportation or sevice it may provide under this subtitle. A motor common carrier shall publish and file with the Com-

mission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a household goods freight forwarder providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of that chapter, respectively, may not become effective for 30 days after it is filed.

(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section. The Commission may prescribe specific charges to be identified in a tariff published by a common carrier providing transportation or service subject to its jurisdiction under subchapter I, III, or IV of that chapter, but those tariffs must identify plainly

(A) the places between which property and passengers will be transported;

(B) terminal, storage, and icing charges (stated separately) if a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter;

(C) terminal charges if a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter III or IV of that chapter;

(D) privileges given and facilities allowed; and

(E) any rules that change, affect, or determine any part of the published rate.

§ 11702. Enforcement by the Interstate Commerce Commission

(a) The Interstate Commerce Commission may bring a civil action—

(1) to enjoin a rail carrier from violating section 10901-10907 or 10933 of this title, or a regulation prescribed or certificate issued under any of those sections;

(2) to enforce section 10527 or 10930 or 11109 or 11111 or 11323 of this title, or subchapter III of chapter 113 of this title and to compel compliance with the order of the Commission under any of those sections and that subchapter;

(3) to enforce an order of the Commission, except a civil action to enforce an order for the payment of money, when it is violated by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title;

(4) to enforce this subtitle (except a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates), or a regulation or order of the Commission or a certificate or permit issued under this subtitle when violated by a motor carrier or broker providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title or by a foreign motor carrier or foreign motor private carrier providing transportation under a certificate of registration issued under section 10530 of this title;

(5) to enforce this subtitle (except a civil action under a provision of this subtitle governing the reasonableness and discriminatory character of rates), or a regulation or order of the Commission or a certificate or permit issued under this subtitle, except a civil action to enforce an order for the payment of money, when violated by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter III of chapter 105 of this title; and

(6) to enforce this subtitle, or a regulation or order of the Commission or permit issued under this subtitle when violated by a carrier providing service subject to the jurisdiction of the Commission under subchapter IV of chapter 105 of this title.

(b) In a civil action under subsection (a)(4) of this section—

(1) trial is in the judicial district in which the motor carrier, foreign motor carrier (as defined under section 10530(a)), foreign motor

private carrier (as defined under section 10530 (a)), or broker operates;

(2) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and

(3) a person participating with a carrier or broker in a violation may be joined in the civil action without regard to the residence of the person.

PARTS 1320-1329—CREDIT REGULATIONS

PART 1320—EXTENSION OF CREDIT TO SHIPPERS BY RAIL COMMON CARRIERS, MOTOR COMMON CARRIERS, WATER COMMON CARIERS, AND HOUSEHOLD GOODS FREIGHT FORWARDERS

Sec.

1320.1 Scope.
1320.2 Extension of credit to shippers.
1320.3 Presentation of freight bills.
1320.4 Effect of mailing freight bills or payments.
1320.5 Additional charges.
1320.6 Computation of time.
1320.7 Charges under average demurrage agreements.
1320.8 Household goods shipments by motor common carriers.
1320.9-1320.16 [Reserved]
1320.17 Interline settlement of revenues.

AUTHORITY: 5 U.S.C. 533 and 49 U.S.C. 1032-1, 10701, 10702, 10741, 10743, and 10744.

SOURCE: 50 FR 2290, Jan. 16, 1985, unless otherwise noted.

§ 1320.1 Scope.

(a) *General.* These regulations apply to the extension of credit in the transportation of property under Interstate Commerce Commission regulation by rail, motor, and water carriers and household

goods freight forwarders, except as otherwise provided.

(b) *Exceptions.* These regulations do not apply to—

(1) Contract carriage operations.

(2) Transportation for—

(i) The United States or any department, bureau, or agency thereof.

(ii) Any State, or political subdivision thereof.

(iii) The District of Columbia.

(3) Property transportation incidental to passenger operations.

[50 FR 2290, Jan. 16, 1985, as amended at 51 FR 44297, Dec. 9, 1986]

§ 1320.2 Extension of credit to shippers.

(a) *Authorization to extend credit.* (1) A carrier that meets the requirements in paragraph (a)(2) of this section may—

(i) Relinquish possession of freight in advance of the payment of the tariff charges, and

(ii) Extend credit in the amount of such charges to those who undertake to pay them (such persons are called "shippers" in this part).

(2) For such authorization, the carrier shall take reasonable actions to assure payment of the tariff charges within the credit periods specified—

(i) In this part, or

(ii) In tariff provisions published pursuant to the regulations in paragraph (d) of this section.

(b) *When the credit period begins.* The credit period shall begin on the day following presentation of the freight bill.

(c) *Length of credit period.* Unless a different credit period has been established by tariff publication pursuant to paragraph (d) of this section, the credit period is 15 days. It includes Saturdays, Sundays, and legal holidays.

(d) *Carriers may establish different credit periods in tariff rules.* Carriers may publish tariff rules establishing credit periods different from those in paragraph (c) of this section. Such credit periods shall not be longer than 30 calendar days.

(e) *Service charges.* (1) Service charges shall not apply when credit is extended and payments are made within the standard credit period. The term "standard credit period," and used in the preceding sentence, means—

(i) The credit period prescribed in paragraph (c) of this section, or

(ii) A substitute credit period published in a tariff rule pursuant to the authorization in paragraph (d) of this section.

(2) Carriers may, by tariff rule, extend credit for an additional time period, subject if they wish to a service charge for that additional time. The combined length of the carrier's standard credit period (as defined in paragraph (e) (1) of this section) and its additional credit period shall not exceed the 30-day maximum credit period prescribed in paragraph (d) of this section. When such a tariff rule is in effect, shippers may elect to postpone payment until the end of the extended credit period if, in consideration therefor, they include any published service charges when making their payment.

(3) Carriers may, by tariff rule, establish service charges for payments made after the expirations of an authorized credit period. Such a rule shall—

(i) Institute such charges on the day following the last day of an authorized credit period, and

(ii) Notify shippers—

(A) That its only purpose is to prevent a shipper who does not pay on time from having free use of funds due to the carrier.

(B) That it does not sanction payment delays, and

(C) That failure to pay within the authorized credit period will, despite this provision for such charges, continue to require the carrier, before again extending credit, to determine in good faith whether the shipper will comply with the credit regulations in the future.

(4) Tariff rules that establish charges pursuant to paragraph (e)(2) or (3) of this section may establish minimum charges.

(f) *Discounts.* Carriers may, by tariff rule, authorize discounts for early freight bill payments when credit is extended.

(g)(1) *Collection expense charges.* Carriers may, by tariff rule, assess reasonable and certain liquidated damages for all costs incurred in the collection of overdue freight charges. Carriers may use one of two methods in their tariffs:

(i) The first method is to assess liquidated damages as a separate additional charge to the unpaid freight bill. In doing so, the tariff rule shall disclose the exact amount of the charges by stating either a dollar or specified percentage amount (or a combina tion of both) of the unpaid freight bill. The tariff shall further specify the time period (which shall at least allow for the authorized credit period) within which the shipper must pay to avoid such liquidated damages.

(ii) The second method is to require payment of the full, nondiscounted rate instead of the discontinued rate otherwise applicable. The difference between the discount and the full rate constitutes a carrier's liquidated damages for its collection effort. Under this method the tariff shall identify the discount rates that are subject to the condition precedent and which require the shipper to make payment by a date certain. The date certain may not be set to occur by the carrier until at least after the expiration of the carrier's authorized credit period.

(2) The damages, the timing of their applicability, and the conditions, if any, as provided by the tariff-rule methods allowed under paragraphs (g)(1)(i) and (ii) of this section also:

(i) Shall be clearly described in the tariff rule;

(ii) Shall be applied without unlawful prejudice and/or unjust discrimination between similarly situated shippers and/or consignees;

(iii) Shall be applied only to the non-payment of original, separate and independent freight bills and shall not apply to aggregate "balance-due" claims sought for collection on past shipments by a bankruptcy trustee, or any other person or agents;

(iv) Shall not apply to instances of clear clerical or ministerial error such as non-receipt of a carrier's freight bill, or shipper's payment check lost in the mail, or carrier mailing of the freight bill to the wrong address;

(v) Shall not apply in any way to a charge for a transportation service if the carrier's bill of lading independently provides that the shipper is liable for fees incurred by the carrier in the collection of freight charges on that same transportation service;

(vi) shall be applied only after the authorized credit period, and when the carrier has issued a revised freight bill or notice of imposition of collection expenses charges for late payment within 90 days after expiration of the authorized credit period.

(3) As an alternative to the tariff-rule methods allowed under paragraphs (g)(1)(i) and (ii) of this section, a carrier may, wholly outside of its tariff, assess collection charges though contract terms in a bill of lading. By using the carrier and its bill of lading, the shipper accepts the bill of lading terms.

(h) *Discrimination prohibited.* Tariff rules published pursuant to paragraphs (a), (e), and (f) of this section shall not result in unreasonable discrimination among shippers.

[50 FR 2290, Jan 16, 1985, as amended at 53 FR 6991, Mar. 4, 1988; 54 FR 30748, July 24, 1989]

§ 1320.3 Presentation of freight bills.

(a) *"To be prepaid" shipments.* (1) On "to be prepaid" shipments, the carrier shall present its freight bill for all transportation charges within the time period prescribed in paragraph (a)(2) of this section, except—

(i) as noted in paragraph (d) of this section, or

(ii) As otherwise excepted in this part.

(2) The time period for a carrier to present its freight bill for all transportation charges shall be 7 days, measured from the date the carrier received the shipment. This time period does not include Saturdays, Sundays, or legal holidays.

(b) *"Collect" shipments.* (1) On "collect" shipments, the carrier shall present its freight bill for

all transportation charges within the time period prescribed in paragraph (b)(2) and of this section, except—

(i) As noted in paragraph (d) of this section, or

(ii) As otherwise excepted in this part.

(2) The time period for a carrier to present its freight bill for all transportation charges shall be 7 days, measured from the date the shipment was delivered at its destination. This time period does not include Saturdays, Sundays, or legal holidays.

(c) *Bills or accompanying written notices shall state penalties for late payment, credit time limits and service charge and/or collection expense charge and discount terms.* When credit is extended, freight bills or a separate written notice accompanying a freight bill or a group of freight bills presented at one time shall state that "failure timely to pay freight charges may be subject to tariff penalties" (or a statement of similar import). The bills or other notice shall also state the time by which payment must be made and any applicable service charge and/orcollection expense charge and discount terms.

(d) *When the carrier lacks sufficient information to compute tariff charges.* (1) When information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at its billing point, the carrier shall present its freight bill for payment within 7 days following the day upon which sufficient information becomes available at the billing point. This time period does not include Saturdays, Sundays, or legal holidays.

(2) A carrier shall not extend further credit to any shipper which fails to furnish sufficient informa-

tion to allow the carrier to render a freight bill within a reasonable time after the shipment is tendered to the origin carrier.

(3) As used in this paragraph, the term "shipper" includes, but is not limited to, freight forwarders, and shippers' associations and shippers' agents within the meaning of 49 U.S.C. 10562(3) and (4).

(e) *Freight bill presentation on railroad transported export traffic loaded into vessels.* The term "delivered at its destination" as used in paragraph (b)(2) of this section shall mean the time when the vessel is completely loaded when—

(1) The traffic in export traffic that is loaded into vessels either—

(i) Direct from railroad cars or piers, or

(ii) From such cars or pirers by means of lighters, and

(2) The freight bills are presented to vessel owners or their representatives.

[50 FR 2290, Jan. 16, 1985, as amended at 53 FR 6991, Mar. 4, 1988; 54 FR 30748, July 24, 1989]

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INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

TRANSCON LINES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATUTES AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS WHY WRIT SHOULD BE DENIED	5
CONCLUSION	15
APPENDIX	1a

TABLE OF AUTHORITIES

CASES Page

Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156 (1922) 6

Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990) ..... *passim*

Reiter v. Cooper, —— U.S. ——, 61 U.S.L.W. 4232 (U.S. Mar. 8, 1993) 6, 7, 11, 13

Southern Pacific Transportation Co. v. Commercial Metals, 456 U.S. 336 (1982) 5, 7, 8, 13, 14

Vedder J. White, et al. v. ICC, —— F.2d ——, No. 92-3528 (3d Cir. Mar. 19, 1993) 8

ADMINISTRATIVE DECISIONS

National Indus. Transp. League—Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates, 3 I.C.C.2d 99 (1986) 5, 11, 14

Nonoperating Motor Carriers—Collection of Undercharges, 8 I.C.C.2d 742 (1992) 8

Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates, 5 I.C.C.2d 623 (1989) 5, 11, 14

STATUTES

49 U.S.C. § 10101, *et seq.* 1, 3

49 U.S.C. § 10701(a) 6, 11

49 U.S.C. § 10743 11

49 U.S.C. § 10761(a) 3

49 U.S.C. § 10762(a)(1) 3, 12

49 U.S.C. § 11702(a)(4)(b)(6) 4

49 U.S.C. § 11705(b)(3) 11

49 U.S.C. § 11906 ..... 2, 13

REGULATIONS

49 C.F.R. § 1322 2

49 C.F.R. § 1320 1

49 C.F.R. § 1320.2(g)(2)(iii) 3

49 C.F.R. § 1320.2(g)(2)(vi) 3

49 C.F.R. § 1320.3(c) 3

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Transcon Lines and Leonard L. Gumport, Chapter 7 Trustee for the Estate of Transcon Lines, hereby request that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit by Petitioner, Interstate Commerce Commission ("ICC" or "Commission") be denied.

STATUTES AND REGULATIONS INVOLVED

In addition to the provisions of the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* and the ICC's credit regulations, 49 C.F.R. § 1320, set forth by Petitioner in its Appendix (App., 61a-74a), Respondents believe the following additional statutory provision is involved:

49 U.S.C. § 11906 Evasion of Regulation of Motor Carriers and Brokers

A person, or an officer, employee, or agent of that person that by any means knowingly and willfully tries to evade regulation provided under this subtitle for motor carriers or brokers shall be fined at least $200 but not more than $500 for the first violation and at least $250 but not more than $2,000 for a subsequent violation.

STATEMENT OF THE CASE

This case involves a suit by the ICC to enjoin Respondents, Transcon Lines and its bankruptcy trustee, Leonard L. Gumport ("Trustee"), from collecting filed tariff charges which the Commission contended could not be enforced because Transcon, while an active carrier, had violated the ICC's credit regulations. The Commission admitted that Transcon's tariff provision, upon which the Trustee had based his undercharge claims, was part of Transcon's filed rates and fully complied with the ICC's credit regulations. However, the ICC maintained that the Trustee could not collect undercharges based upon that tariff because Transcon had not complied with other, non-tariff, requirements set forth in the ICC's credit regulations.

The tariff provision at issue provided that discounts off Transcon's rates were conditioned upon a shipper's paying the rate within ninety days. Failure by a shipper to pay the full discounted rate within that time period resulted in a loss-of-discount penalty.[1]

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[1] Transcon's loss-of-discount tariff provided in relevant part:

1. Allowances, discounts, exception classes and commodity rates shall apply only when tariff charges are paid within ninety calendar days from date of shipment.
2. The provisions of this rule do not change the carrier's obligation to collect nor the freight charge payor's obligation to pay tariff charges within the standard credit period maintained by the carrier in compliance with ICC regulations, 49 C.F.R. 1322. This rule simply establishes a condi-

The Trustee admitted that Transcon did not comply with other provisions of the regulations which did not involve Transcon's tariffs. Specifically, the ICC claimed, and the Trustee did not dispute, that Transcon had failed to specifically state its loss-of-discount penalty in its original freight bills as required by 49 C.F.R. § 1320.3(c). Second, Transcon had not issued revised freight bills that included the undiscounted charges as liquidated damages within ninety days after the expiration of the authorized credit period as required by 49 C.F.R. § 1320.2(g)(2)(vi). Third, Transcon had not sent out individual bills to shippers seeking to apply the loss-of-discount penalty, and the Trustee, out of necessity, applied the loss-of-discount provision by aggregating freight bills in violation of 49 C.F.R. § 1320.2(g)(2)(iii).

The Trustee argued that the ICC's credit regulations could not be used to prevent his collection of Transcon's filed rate based upon this Court's decision in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990). As a second ground for denying the injunction, the Trustee claimed that Transcon's entire discount scheme was illegal because the discounts were masked by secret numerical codes. Without a filed "key" to the shipper codes the discounts were not "published" as required by the Interstate Commerce Act ("the Act"), 49 U.S.C. § 10101, *et seq.*, and specifically 49 U.S.C. § 10762(a)(1). The Trustee, therefore, claimed that the ICC could not compel him to adhere to these discounts.

The district court agreed with the Trustee on both grounds finding that the ICC's credit regulations could not be enforced to the extent that they undermined the statutory filed-rate doctrine as codified at 49 U.S.C. § 10761(a). The district court went on to agree with

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tion precedent for the application of the special tariff provisions described in paragraph 1 above.

(Vol. I, Resp. SER 41 (ICC TCON 103-A, item 210).)

the Trustee's second, alternate ground finding the discounts themselves violated the publication requirement of the Act and, therefore, could not be enforced. Thereupon, the district court denied the ICC's motion for summary judgment, and granted the Trustee's cross-motion for summary judgment, dismissing the case.

The ICC timely filed an appeal with the Ninth Circuit. On appeal, the Ninth Circuit affirmed the district court with regard to the dismissal of the ICC's injunction for Transcon's credit rules violation, but reversed the district court on the second ground involving the secretly coded tariffs.[2]

The court of appeals recognized that the ICC was authorized by statute to bring a civil action to enforce its regulations against motor carriers, including the trustees of bankrupt motor carriers. This enforcement power includes the power to seek an injunction pursuant to 49 U.S.C. § 11702(a)(4)(b)(6). However, the court of appeals said the Commission could not use its injunctive powers to enforce regulations in such a way as to undercut the filed rate requirement. "Regulations, however valid in other contexts, cannot furnish the reason for

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[2] The Trustee is filing contemporaneously with this brief in opposition, a cross-petition seeking a writ of certiorari from the Ninth Circuit's judgment reversing the district court on the alternate ground. In the event that the Court deems it necessary to grant the ICC's petition, the Court should grant his cross-petition in order to ensure that both theories pled by the Trustee in defense to the ICC's injunction action are adequately reviewed. On the other hand, if the Court denies the ICC's petition, consideration of the alternate ground raised in the Trustee's cross-petition will remain outstanding. Since the validity of secretly coded rates does not involve interpretation of the ICC's credit regulations, this Court may properly reject the ICC's petition without prejudicing the ICC's right to oppose the Trustee's cross-petition.

letting a carrier abandon the filed rate." Pet. App., 19a.[3] The court of appeals found that the ICC improperly sought to enforce its credit regulations in a way that encourages and endorses "circumventing the filed rate requirements, for it would prevent the trustee from collecting the bureau rates in accordance with all of its filed rates." *Id.* The court of appeals concluded that if the ICC's injunctive action against the trustee's filed rate was allowed to stand, the ICC [would permit] "the very price discrimination the Act by its terms seeks to prevent." *Id.* citing *Maislin*, 110 S.Ct. at 2768. The ICC's broad interpretation of its regulations was rejected by the court of appeals as of no greater force and effect than the *Negotiated Rates* policy [4] rejected by this Court in *Maislin*. The court of appeals, therefore, affirmed the district court's judgment in favor of the Trustee as to the collection of undisclosed rates on overdue accounts. Pet. App., at 27a.

REASONS WHY WRIT SHOULD BE DENIED

The ICC concedes in its Petition that "[a] shipper cannot raise the carrier's violation of the credit regulations in defense to an action to collect the filed rate." Pet. at 5,[5] citing *Southern Pacific Transportation Co. v. Commercial Metals*, 456 U.S. 336 (1982). That being said, however, the ICC believes that it may somehow "step into the shoes" of the shipper and through an enforcement action utilize its credit regulations to preclude a carrier from enforcing its duly filed, and legal, loss-of-discount tariff

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[3] Citations to the appendix submitted with the Petition are referred to as "Pet. App., ——;" citations to the appendix submitted with this Brief in Opposition are referred to as "Opp. App., ——."

[4] *See National Indus. Transp. League—Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates*, 3 I.C.C.2d 99 (1986); *Petition To Institute Rulemaking On Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623 (1989).

[5] Citations to the petition for writ of certiorari are referred to as "Pet. at ——."

if the carrier fails to otherwise comply with the ICC's credit regulations. The underlying rationale behind the ICC's position is the ICC's view that it is unfair for a carrier to enforce its tariff unless the carrier repeatedly gives actual notice of the tariff provision to the shipper. Yet, as repeatedly recognized by this Court, "the filed rate governs the legal relationship between shipper and carrier." *Maislin*, 111 L.Ed.2d at 105. Moreover, "unless and until suspended or set aside, [the published tariff] is made for *all purposes*, the legal rate, as between carrier and shipper." *Id.* (*citing Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922)) (emphasis supplied).

The court of appeals correctly told the ICC what it was told previously by this Court in *Maislin*: The ICC has no power to enforce regulations in such a manner as to prevent carriers from enforcing their duly filed tariffs. In *Maislin*, the ICC asserted that its express statutory power to prohibit "unreasonable practices" pursuant to 49 U.S.C. § 10701(a) permitted it to prohibit a carrier from enforcing its filed tariff. The unreasonable practice was the carrier's attempt to collect its filed rate from a shipper after having negotiated with the shipper, and having billed the shipper, a rate different from the filed rate. In *Maislin*, this Court recognized that the carrier's practice of negotiating and billing unfiled rates was illegal and could subject the carrier to a civil and criminal penalties including the issuance of a cease and desist order (i.e. injunction). Yet, this Court held that the ICC could not prevent the carrier, or its bankruptcy trustee, from collecting the filed tariff. This Court explained: (1) the filed-rate doctrine is "utterly central" to the Interstate Commerce Act, so that (2) the ICC has no power to adopt rules requiring "adherence to unfiled rates . . . ." *Maislin*, 111 L.Ed.2d 94 at 112.

Notwithstanding the clear directive of *Maislin*, the ICC asserts that this Court's recent decision in *Reiter v. Cooper*,

—— U.S. ——, 61 U.S.L.W. 4232 (U.S. Mar. 8, 1993) somehow has modified the effects of *Maislin* with regard to the ICC's ability to prevent the enforcement of a carrier's filed rate. "The [filed rate] doctrine, however, does not defeat a shipper's claims and defenses that are specifically accorded by the [Act] itself." Pet. at 8, citing *Reiter*, slip op. at 7. Yet, just five pages earlier in its petition, the ICC correctly cites this Court's holding in *Southern Pacific Transportation Co. v. Commercial Metals, supra*, that a shipper cannot raise the carrier's violation of the ICC's credit regulations in defense of an action to collect the filed rate. Since a shipper cannot plead a carrier's violation of the credit regulations as a defense, it must not be a defense "specifically accorded by the Act itself." *Reiter* thus provides no assistance to the ICC's attempt to forge an end run around *Maislin*.

The ICC makes the incredible claim that the court of appeals decision, "[b]y stripping the ICC of authority to enforce its credit regulations within the Ninth Circuit . . . exposes thousands of shippers to claims that directly violate governing ICC regulations." Pet. at 9. Of course, the court of appeals decision does nothing of the sort. The court of appeals opinion in this case no more vitiates the ICC's statutory power over, and right to regulate, motor carrier credit than *Maislin* vitiated the ICC's statutory power over, and right to regulate, motor carrier practices. The ICC continues to be free to regulate the credit practices of all carriers throughout the United States, including those within the Ninth Circuit. The ICC may, and should, issue cease and desist orders and seek injunctions against carriers that violate its credit regulations. As noted by this Court in *Commercial Metals*:

> The ICC has ample authority to police the credit practices of carriers and thereby to deter improper practices. This authority includes the power to issue a cease-and-desist order, the power to seek a federal

> court injunction requiring the carrier to comply with the regulations, and the power to bring suit for the $5,000.00 civil forfeiture, provided by [the Act], for each knowing violation of an order of the Commission.

456 U.S. at 349-50 (citations omitted).[5]

The ICC also wrongly claims that the court of appeals opinion somehow allows carriers to "avoid ICC regulation by inserting contrary terms in their tariffs." Pet. at 9. This is untrue. The court of appeals correctly recognized that the loss-of-discount provision in Transcon's filed rate "was adopted after the 1988 amendment to the ICC regulations that specifically authorize such provisions." Pet. App., 20a. The court of appeals also recognized that it was confronted with an unambiguous, legally filed tariff: "there is a single filed tariff governing here: the rules tariff providing that the discount lasts only for 90 days after the date of shipment and that timely payment is a precondition of the discount." *Id.*

The ICC wrongly characterizes the court of appeals' opinion. The ICC should know better. At argument before the Ninth Circuit the following colloquy took place between court and counsel for the ICC:

> THE COURT: Right. And you say, is it your contention then that the tariff did violate the regulation requiring notice in effect in the bill of lading[?]

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[6] Recently, the Third Circuit in *Vedder J. White, et al. v. ICC*, —— F.2d ——, No. 92-3528 (3d Cir. Mar. 19, 1993) rejected the ICC's attempt to utilize *Commercial Metals* to justify interfering with the collection of filed tariff charges by the bankruptcy trustee. In *Vedder J. White*, the Third Circuit set aside ICC regulations promulgated in *Nonoperating Motor Carriers—Collection of Undercharges*, 8 I.C.C. 2d 742 (1992). These illegal regulations operated to enjoin trustees from proceeding with undercharge actions unless preapproved by the ICC. The ICC has voted not to appeal *Vedder J. White*. See "Media Advisory, ICC Will Not Appeal Adverse Court Decision," *ICC News*, Mar. 31, 1993. Opp. App., 1a-2a.

> MR. RUSH: No. *We don't contend the tariff violated anything.* We contend that the tariff was one of the four things that had to be done in order to be released from the obligations to charge no more than the discounted rate.

Opp. App., 3a, 4a (emphasis supplied).

In light of this concession, there is no merit to the ICC's claim that the court of appeals decision enforcing the tariff "threatens to sow confusion in the application of the filed-rate doctrine." Pet. at 9.

The ICC also wrongly suggests that the court of appeals "erroneously extended *Maislin.*" Pet. at 10. The ICC attempts to distinguish *Maislin* by claiming that its injunction action does not recognize an equitable defense based upon a negotiated, unfiled rate. Yet, it is undisputed that the ICC's enforcement action would prevent the Trustee from collecting Transcon's duly filed rate. The Commission attempts to subvert the filed rate by calling the undiscounted rate a "credit term," which is "available only because ICC regulations authorize carriers to release goods without payment and then to define liquidated damages for late payment by reference to the non-discounted tariff rate." Pet. at 11-12. Yet the ICC again ignores the admissions of its own counsel.

Judge Hill requested counsel for the ICC to confirm on the record whether Transcon's "filed rate" included *all* of Transcon's filed tariffs. Counsel for the ICC conceded this point:

> THE COURT: For the purposes of interpreting *Maislin* and determining what the "filed rate" is, as the term is used in the filed-rate doctrine, I believe that the Defendant Trustee here is correct as it defines that term. Defendant defines the term "filed rate" to include *all* of Transcon's tariffs, including class rates, bureau rates, rules tariffs, and discount rates.

> Now, I would like to hear from you, Mr. Day, whether you take issue with that definition of the term "filed rate."
>
> MR. DAY: Your honor—
>
> THE COURT: Just that question.
>
> MR. DAY: Just that question. No, *I don't take issue with that at all.*

Pet. App., 44a-45a (emphasis supplied).

The court of appeals also properly dispensed with the ICC's claim that Transcon's loss-of-discount provision constituted "liquidated damages" which even though published in a tariff cannot be enforced unless the carrier complied with all provisions of the credit regulations. "Going by the filed rate as we must, there is a single filed tariff governing here: the rules tariff providing that the discounts last only for ninety days after the date of shipment and that timely payment is a precondition of the discount." Pet. App., 20a.

Since it is undisputed that Transcon's loss-of-discount provision was part of Transcon's filed rate and was lawful, it defies logic to assume that an injunction which prevents operation of a lawful and duly-filed tariff "would not interfere with enforcement of the filed rate." Pet. at 12.

The ICC's reliance on allegedly contrary court decisions is seriously misplaced. *See* Pet. at 12 n.11. The cited courts of appeals decisions are unpublished and not on point. As noted by the court of appeals, the earlier decisions by the Third and Fifth Circuits involved review of tariff provisions which were published in violation of then-existing ICC tariff regulations. In contrast, the Transcon tariff provision at issue in this proceeding are admittedly in compliance with the ICC regulations. *See* App., 20a; Opp. App., 3a-4a.

When forced to admit that Transcon's loss-of-discount provision is a duly-filed, legal rate, the ICC still wrongfully maintains that *Maislin* does not require compliance

with the filed-rate doctrine. Pet. at 12. Instead, the ICC opines that because *Maislin* contains the caveat that the filed rate "is not enforceable if the ICC finds the rate to be unreasonable" (citing 497 U.S. at 128), a filed rate is "not enforceable" if the ICC finds that the carrier violated its credit regulations. Pet. at 13. Of course, as this Court pointed out in *Reiter v. Cooper*, the exception for rate unreasonableness is limited to the "explicitly conferred" statutory right of a shipper to seek reparations. 49 U.S.C. § 11705(b)(3).

> We can agree with respondents that this latter category does not include any 'unreasonable-rate defense,' derived from the general ICA requirement (now codified in § 10701(a)) that a carrier's rates be 'reasonable.' But we cannot agree that the filed-rate doctrine precludes shippers from asserting (by way of claim *or* counterclaim) the reparations rights explicitly conferred by § 11705(b)(3).

Slip op. at 7 (citation omitted).

Here, the ICC can point to no "explicit" provision of the Act which would allow the Commission, through its enforcement powers, to provide a defense to shippers who failed to pay a carrier's filed rate charges even though the carrier violated the ICC's credit regulations. The general authority given to the ICC in the Act to regulate carrier credit, 49 U.S.C. § 10743, is not enough to overcome the provisions of the filed-rate doctrine.

This Court rejected the ICC's similar view that the ICC could require compliance with unfiled rates by reason of the ICC's statutory authority (49 U.S.C. § 10701(a)) to regulate unreasonable practices. *Maislin*, 111 L.Ed.2d at 104-05, 111-12. The ICC may not use its power under one part of the Act to undermine the Act's "utterly central" filed rate provisions. *Id.* "By sanctioning an adherence to unfiled rates, the ICC rule 'undermines the basic structure of the Act.'" *Maislin*, 111 L.Ed.2d at 112. It made no difference that the *Negotiated Rates*

policy was a purported *remedy* "to comply with § 10762's directive to file the negotiated rate with the ICC." *Maislin,* 111 L.Ed.2d at 111. Nevertheless, the ICC now claims the court of appeals erred when it similarly stated that the Commission could not use its credit provisions promulgated pursuant to the Act in an equally illegal attack on the "utterly central" filed rate provisions.

Finally, the ICC strongly suggests that there is some nationwide plague of loss-of-discount cases which demands that this Court reverse the sound decision of the court of appeals. The Commission states:

> Millions of shippers around the country rely on the ICC's credit regulations in arranging transportation with motor carriers. Under the court of appeals' decision, however, the ICC has no effective remedy to enforce compliance with those regulations. . . . The court of appeals' ruling creates a particularly serious threat, because it calls into question whether shippers can rely on any aspect of ICC regulations regarding interstate transportation.

Pet. at 16.

The court of appeals addressed this improper claim of the ICC's as well:

> The equities here are not necessarily with the late-paying shippers. They enjoyed an extension of credit by the carrier while the carrier became insolvent. It is not unfair to make them now contribute to the payment of the carrier's unsecured creditors. But under *Maislin,* we need not balance equities. The filed rate is decisive.

Pet. App., 20a-21a.

It is almost laughable for the ICC to state that it "has no effective remedy" to enforce compliance with its credit regulations unless it prevents a trustee from enforcing a bankrupt motor carrier's loss-of-discount provision. The ICC has forgotten, or chosen not to use, all of the enforce-

ment powers enunciated by this Court in *Commercial Metals*. Those enforcement powers are unaffected by the decision in this case. Also, the ICC remains free to authorize or prohibit the use of loss-of-discount tariffs. But the ICC cannot have it both ways: the ICC cannot authorize carriers to file loss-of-discount tariffs *and* simultaneously preclude carriers from enforcing those tariffs as required by *Maislin*. The ICC can also use its regulatory powers to require carriers while still active to cease and desist illegal acivity as it should have done in the case of Transcon. For example, the ICC can compel operating carriers to rebill all shippers in compliance with its regulations. The ICC could also seek to issue fines to the operating individuals in charge of the carrier at the time the carrier failed to comply with the ICC's regulations. 49 U.S.C. § 11906. To fine individuals rather than deprive creditors of valuable estate assets would send a serious message which would prevent abuse in the future. What the ICC cannot do is prevent carriers and their trustees from enforcing lawful filed rates.

The ICC claims the proper course to follow is for this Court to vacate the court of appeals' judgment and remand the case for further consideration in light of *Reiter v. Cooper*. Pet. at 18. However, *Reiter v. Cooper* provides no support for the ICC's view that the ICC may enjoin the operation of a duly filed, legal tariff. *Reiter* addresses only a shipper's right to assert by way of a recoupment counterclaim the right of reparations "explicitly" afforded by the Act. All shippers who receive undercharge claims based on Transcon's loss-of-discount provision will still have that same right and there is nothing in the court of appeals' decision which implies the contrary.

In the alternative, by way of footnote, the ICC suggests that this Court might consider "summary reversal of the judgment" in view of this Court's "recognition" in *Commercial Metals* that the ICC has injunctive powers to enforce its credit regulations. Pet. at 18, n.18. How-

ever, the court of appeals decision does not conflict with *Commercial Metals*. *Commercial Metals* denied shippers the right to utilize a violation of the ICC's credit regulations as a defense to the carrier's collection of the filed rate. There is nothing within *Commercial Metals* which would allow the ICC to "step into the shoes" of the shipper and provide the shipper with the same defense by way of an injunctive action.

Commercial Metals also states that the ICC, as opposed to the shipper, has the statutory power to enforce credit regulations. 456 U.S. at 349. *Commercial Metals* does *not* address the issue of whether the ICC can enforce its regulations by way of injunction in such a way as to violate the filed-rate doctrine. This Court resolved that issue eight years later in *Maislin*. The ICC may not use its regulatory powers, whether it be under the unreasonable practices provision or the credit provisions of the Act, to undermine the "utterly central" filed rate provisions of the Act. For the same reason that this Court invalidated the ICC's illegal *Negotiated Rates* policy, the court of appeals correctly declined to enforce the ICC's credit regulations in the manner requested by the Commission.

CONCLUSION

Because the court of appeals was right, and because thousands of Transcon's creditors and former employees are entitled to have the Trustee recover Transcon's filed rate charges, this Court should deny the ICC's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

ICC News—March 31, 1993

Interstate Commerce Commission
ICC NEWS
12th & Constitution Avenue NW. Washington, DC 20423

For Release:
Wednesday, March 31, 1993
No. 93-89

Contact: Alvin H. Brown
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MEDIA ADVISORY

ICC WILL NOT APPEAL ADVERSE COURT DECISION; WILL EXPLORE OTHER MEANS TO PREVENT SHIPPER ABUSE

Interstate Commerce Commission Chairman Gail C. McDonald announced today that the Commission has decided not to seek further review of the decision of the United States Court of Appeals for the Third Circuit, issued March 19, 1993, in *White v. United States and ICC*, setting aside the Commission's Ex Parte MC-208 Rules that set up a prescreening process for certain categories of undercharge claims. Rather, as suggested by the court, the Commission intends to focus its efforts on reformulating the rules to protect the victims of abusive collection practices in a manner that will satisfy the court, and determining whether to seek appropriate legislation.

In the Ex Parte MC-208 Rules, the Commission attempted to directly supervise rebillings by carriers that are no longer operating, by requiring those carriers to get its pre-clearance for certain undercharge claims, so that the agency could weed out those that do not have any basis under the Interstate Commerce Act. In *White*, the court

concluded that the Commission does not have broad enough authority to screen claims in this manner. However, the court acknowledged the gravity of the undercharge situation and suggested that the Commission either reformulate the Ex Part MC-208 Rules in a manner that avoids any agency adjudication of claims or seek legislation clearly conferring upon the agency the authority it sought to exercise. The Commission intends to fully explore both of these avenues.

The Third Circuit decision was issued in *Vedder J. White et al. v. United States and Interstate Commerce Commission*, No. 92-3528 et al. The Ex Parte MC-208 Rules were adopted in *Non-Operating Motor Carriers—Collection of Undercharges*, 8 I.C.C. 2d 742 and I.C.C. 2d 35 (1992).

Copy of Excerpt of Unofficial Transcript of Oral Argument of *ICC v. Transcon* on April 8, 1992 Concerning: The Lawfulness of Transcon's Loss-of-Discount Tariff

---

BY THE COURT:

Well as I understand it, I want to clarify something—as I understand it in 1988 the Commission adopted a regulation that expressly authorized loss of discount provisions.

MR. RUSH:

As a measure of liquidted damages for the need to collect, yes Sir.

BY THE COURT:

And at that point the regulations did not include did they these detailed notice and rebilling requirements.

MR. RUSH:

From 1985 the regulations required that if you were going to impose any penalty that the exact amount and nature and how it came into being must be shown on your bill of lading so that much existed in 1988 because it was there from 1985. The other two provisions were adopted in 1989. The rebilling and the no aggregate batch assertion requirements.

BY THE COURT:

Alright. So the filed rate could not have violated those particular regulations—the latter regulations you were describing at the time of the filing.

MR. RUSH:

No because it was filed in 1987.

BY THE COURT:

Right. And you say, is it your contention then that the tariff did violate the regulation requiring notice in effect in the bill of lading.

MR. RUSH:

No. We don't contend the tariff violated anything. We contend that the tariff was one of four things that had to be done in order to be released from the obligation to charge no more than the discounted rate.

* * * *

Supreme Court, U.S.
FILED
APR 22 1993
OFFICE OF THE CLERK

No. 92-1547

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

TRANSCON LINES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICUS CURIAE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF REASONS WHY WRIT SHOULD BE DENIED	3
REASONS WHY WRIT SHOULD BE DENIED	4
I. THE NINTH CIRCUIT DECISION DISMISSING THE INJUNCTION IS IN ACCORDANCE WITH *REITER v. COOPER*	4
II. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH *COMMERCIAL METALS*	6
III. THE NINTH CIRCUIT'S DECISION UPHOLDS THE FILED RATE DOCTRINE	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Consolidated Rail Corp. v. Container Systems Corp., 553 F. Supp. 418 (S.D.N.Y. 1981) 7, 9

Maislin Industries, U.S. v. Primary Steel, Inc., 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990) 6, 7, 8, 9

Reiter v. Cooper, 61 U.S.L.W. 4232 (March 8, 1993) 3, 4, 5, 6, 8

Southern Pacific Transp. Co. v. Commercial Metals, 456 U.S. 336, 102 S.Ct. 1815, 72 L.Ed.2d 114 (1982) 4, 6, 7, 8, 9

STATUTES

49 U.S.C. § 10701(a) 5

49 U.S.C. § 10741(b) 9

49 U.S.C. § 10761(a) 2, 6

49 U.S.C. § 10762(a)(1) 2, 6

49 U.S.C. § 11705(b)(3) 5

REGULATIONS

49 C.F.R. § 1320.2(g)(2)(iii) 2

49 C.F.R. § 1320.2(g)(2)(vi) 2

49 C.F.R. § 1320.3(c) 2

IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF AMICUS CURIAE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS IN SUPPORT OF RESPONDENTS

Amicus Curiae, the International Brotherhood of Teamsters ("IBT"), hereby requests that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit sought by Petitioner, Interstate Commerce Commission ("ICC" or "Commission"), be denied.

INTEREST OF AMICUS CURIAE

This case involves an effort by Transcon Lines' ("Transcon") trustee in bankruptcy to recover undercharges that resulted from shippers failing to pay filed tariff rates. Transcon's duly published tariff provided for a discount if

shippers paid freight charges within 90 days of shipment. Failure to pay within the 90 days resulted in the application of the otherwise published non-discount rates. After Transcon went into bankruptcy, an audit of its records showed that many shippers had paid discount rates long after the 90-day period had elapsed. Since this was in clear violation of Transcon's tariff, the trustee sought to recover the applicable undercharges from the shippers, *i.e.*, the difference between the discount and non-discount rates. The ICC has sought to enjoin the trustee from collecting these undercharges on the basis that Transcon failed to comply with the Commission's credit regulations.[1]

Both the district court and the court of appeals rejected the ICC's arguments that failure to adhere to certain credit regulations prohibited the trustee from collecting Transcon's filed tariff rates.[2] The ICC has, however, filed a number of petitions for reconsideration in conjunction with requests for a stay of the trustee's collection efforts. Although the court of appeals has refused to reverse its dismissal of the injunction, these petitions have managed to delay collection of the undercharges. The ICC now has sought to further delay matters by filing this petition for a writ of certiorari (hereafter "Petition") with this Court.

Former and current members of the IBT who had been employed by Transcon are the largest creditors of the Transcon estate. A proof of claim has been filed in the

---

[1] The ICC has alleged that Transcon's original bills did not advise shippers of the consequences of late payment, in violation of 49 C.F.R. 1320.3(c); revised bills were not issued until after the 90-day period provided for in 49 C.F.R. 1320.2(g)(2)(vi); and the trustee sought to apply the loss-of-discount provision on an aggregate basis, contrary to 49 C.F.R. 1320.2(g)(2)(iii).

[2] The duty of a carrier to collect and a shipper to pay filed tariff rates, sometimes referred to as the "filed rate doctrine", is a clear requirement of the Interstate Commerce Act. 49 U.S.C. §§ 10761(a) and 10762(a)(1).

bankruptcy proceeding on their behalf for back wages, severance pay, etc., for more than $23 million. (A copy of that proof of claim is attached hereto as Appendix A.) In addition, a claim for almost $16 million was filed by the Central States, Southeast and Southwest Areas Pension Fund, which is the pension fund covering IBT members employed by Transcon. (A copy of that proof of claim is attached as Appendix B hereto.) The undercharge claims brought by Transcon's trustee are the estate's major, if not only, asset and the collection of these claims represents the only hope which these former employees have of recovering any portion of the monies they are owed. For that reason and because adoption of the ICC's position would significantly erode the filed rate doctrine which is of critical importance to the well being of hundreds of other motor carriers and the thousands of people they employ, many of whom are IBT members, this brief is being filed in support of the Respondents and in opposition to the Petition.

SUMMARY OF REASONS WHY WRIT SHOULD BE DENIED

The decision of the Ninth Circuit correctly held that a failure to adhere to certain procedural rules concerning the application of credit did not obviate the statutory requirement that Transcon collect and its shippers pay filed tariff rates. Pet. at 19a.[3] In recently reaffirming the filed rate doctrine in *Reiter v. Cooper*, 61 U.S.L.W. 4232 (March 8, 1993), this Court held that shippers may assert defenses or counterclaims accorded them by the Interstate Commerce Act to avoid payment of the tariff rate. *Reiter v. Cooper* did not, however, authorize the ICC to prohibit or interfere in any way with a trustee's efforts to collect filed tariff rates. There is absolutely no merit to the ICC's contentions that the Ninth Circuit

[3] Citations to the ICC's Petition and Appendices are referred to as "Pet. at ——."

decision should be remanded for reconsideration in light of *Reiter v. Cooper.*

In *Southern Pacific Transp. Co. v. Commercial Metals,* 456 U.S. 336 (1982), this court rejected the very same position now being advanced by the Commission. Thus, *Commercial Metals* held that a violation of credit regulations by a common carrier did not provide a basis for avoiding the carrier's filed tariff rates. The Commission's general authority to enforce its credit regulations does not include the authority to set aside the filed rate doctrine.

The ICC's credit regulations, consistent with the Interstate Commerce Act, are intended to prevent discrimination among shippers. *Southern Pacific Transp. Co. v. Commercial Metals,* 456 U.S. at 346. By permitting a shipper to obtain a rate it was not entitled to receive under the carrier's tariff because of failure to pay within a prescribed period, that shipper would be unduly preferred to the detriment of other shippers. In dismissing the ICC's efforts to enjoin the trustee from enforcing the loss of discount provision in Transcon's tariffs, the Ninth Circuit was preventing discrimination among shippers.

REASONS WHY WRIT SHOULD BE DENIED

I. THE NINTH CIRCUIT DECISION DISMISSING THE INJUNCTION IS IN ACCORDANCE WITH *REITER v. COOPER*

The ICC requests in its Petition that this Court "vacate the judgment and remand the case to the court of appeals for further consideration in light of *Reiter v. Cooper* [61 U.S.L.W. (March 8, 1993)]." Pet. at 18. The ICC's contention that the court of appeals' decision is inconsistent with *Reiter v. Cooper* is unfounded. Indeed the Ninth Circuit's decision is mandated by and entirely consistent with *Reiter.*

The ICC interprets *Reiter* as granting the ICC the authority to "bring a civil action to enforce the [Interstate

Commerce] Act" including the "prohibition of credit transactions except as authorized by ICC regulations." Pet. at 15. In *Reiter*, this Court reaffirmed the validity and need for strict enforcement of the filed rate doctrine. *Reiter v. Cooper*, 61 U.S.L.W. at 4233 and 4234. While the *Reiter* Court went on to hold that *shippers* may avoid the filed rate by asserting claims and defenses accorded by the Act, nowhere in *Reiter* does the Court grant the ICC authority to seek to enjoin collection of the filed tariff rates by a bankruptcy trustee.

> The filed rate doctrine embodies the principle that a *shipper* cannot avoid payment of the tariff by invoking common-law claims and defenses such as ignorance, estoppel, or prior agreement to a different rate. * * * It assuredly does *not* preclude avoidance of the tariff rate, however, through *claims* and *defenses* that are specifically accorded by the ICA itself. We can agree with respondents that this latter category does not include any 'unreasonable-rate defense,' derived from the general ICA requirement (now codified in § 10701(a)) that a carrier's rates be 'reasonable.' * * * But we cannot agree that the filed rate doctrine precludes *shippers* from asserting (by way of *claim* or *counterclaim*) the reparations rights explicitly conferred by § 11705(b)(3).

Reiter v. Cooper, 61 U.S.L.W. at 4234 (emphasis added; citations omitted). While the ICC acknowledges that the *Reiter* Court granted only shippers the right to raise defenses and counterclaims, it then contends without any support that "this principle applies with even greater force to injunctive actions brought by the ICC to effect compliance with the requirements of the Act." Pet. at 9. The ICC's contention is noticeable for its lack of authority.

Even assuming *arguendo* that the ICC could step into a shipper's shoes to assert a claim or defense to an undercharge action, failure to adhere to ICC credit regulations is not a claim or defense cognizable under the Interstate

Commerce Act to such an action by a trustee. The filed rate doctrine, *i.e.*, the duty of the carrier to collect and the shipper to pay filed tariff rates (see 49 U.S.C. §§ 10761(a) and 10762(a)(1), and *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990)) cannot be thwarted because of a carrier's failure to comply with credit regulations. This was the holding of the Court in *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982). In *Commercial Metals*, the Court specifically concluded that,

> . . . the carrier's . . . violation of the credit regulations are insufficient . . . to overcome the time-honored rule that under such circumstances, no act or omission of the carrier (except the running of the statute of limitations) will estop or preclude it [the carrier] from enforcing payment of the full amount by a person liable therefor.

Id. at 352 (citations omitted). Since a shipper cannot avoid the enforcement of the filed rate by asserting violations of the ICC's credit regulations, there is no basis under *Reiter v. Cooper* for finding that the ICC may do so. Even if *Reiter* were construed as enabling the ICC to assert the same claims and defenses as a shipper to an undercharge action, it clearly does not give the ICC additional defenses which are not available to shippers.

Accordingly, the ICC's argument that *Reiter v. Cooper* is in conflict with the court of appeals' decision is unfounded and misleading. To the contrary, the holding of the court of appeals enforcing Transcon's filed rates is fully consistent with and indeed mandated by the Court's decision in *Reiter*.

II. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH *COMMERCIAL METALS*

In the alternative, the ICC suggests in a footnote that the court of appeals' decision should be summarily reversed in view of this Court's recognition in *Southern Pacific Transp. Co. v. Commercial Metals, supra*, that

the ICC may enforce its credit regulations through an injunction. Pet. at 18.

The court of appeals, in accordance with *Commercial Metals*, recognized that the ICC has the general authority to enforce its credit regulations by seeking an injunction and that the ICC has broad powers to shape remedies for the violation of its rules. Pet. at 18a. Thus, for example, the ICC could prohibit carriers from extending credit when they have previously done so in violation of ICC regulations or it could reject tariff credit provisions which fail to comply with regulations. However, as noted above, both this Court in *Commercial Metals* and the court of appeals below, concluded that a violation of the credit regulations does not preclude collection of the filed rate:

> [N]either the statute under which the regulations were promulgated, 49 U.S.C. § 3(2), nor the regulations themselves intimate that a carrier's violation of the credit rules automatically precludes it [the carrier] from collecting the lawful freight charge.

Southern Pacific Transp. Co. v. Commercial Metals, Co., 456 U.S. at 344-345.

> The case, however, is different when the ICC seeks an injunction applying its regulations in such a way as to undercut the filed [rate] requirement. Then *Maislin* governs. Regulations, however valid in other contexts, cannot furnish the reasons for letting the carrier abandon the filed rate.

Pet. at 19a.[4] Accordingly, notwithstanding the ICC's contention to the contrary, the court of appeals' decision was entirely consistent with *Commercial Metals*.

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[4] See also *Consolidated Rail Corp. v. Containair Systems Corp.*, 553 F. Supp. 418, 421 (S.D.N.Y. 1981) holding that credit regulations ". . . implement the Congressional purpose of preventing rate discrimination in the form of differential credit arrangements" and "provide no basis for imposing the extraordinary relief of excusing compliance with applicable tariffs." It is also noteworthy that the credit regulations relied upon by the ICC do not provide an affirmative defense to undercharge claims. See *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. at 345.

III. THE NINTH CIRCUIT'S DECISION UPHOLDS THE FILED RATE DOCTRINE

The ICC also argues (Pet. at 17) that the court of appeals' decision distorts the filed rate doctrine and creates confusion for the ICC and the millions of regulated shippers:

> . . . [the court of appeals' decision] harms entities that ICC regulation is designed to protect and erodes public confidence in the stability of the regulated industry. The court of appeals ruling creates a particularly serious threat, because it calls into question whether shippers can rely on any aspect of ICC regulations regarding interstate transportation.

Pet. at 16. This is plainly untrue. As the Court has repeatedly held in *Commercial Metals* and *Maislin*, the filed rate doctrine is "utterly central" to the administration of the Interstate Commerce Act and without it, it would be "monumentally difficult to enforce" the statute's nondiscriminatory and reasonableness requirements. *Maislin Industries, U.S. v. Primary Steel, Inc.*, 110 S.Ct. at 2769, and *Southern Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. at 343-344. Here, the ICC is seeking to enjoin collection of filed tariff rates and thus rather than promoting public confidence, the ICC's actions if allowed to prevail would undermine the administrative foundations of the Act.

Refusing to enforce Transcon's loss of discount provisions—the filed rate—would not only be contrary to the Interstate Commerce Act and this Court's recent decisions in *Maislin* and *Reiter v. Cooper*, but it would also run afoul of the well-established principle that strict enforcement of tariff terms is required to prevent discrimination between shippers.

> This rule of strict adherence to statutory standards is in line with the historic purpose of the Interstate Commerce Act—to achieve uniformity in freight

> transportation charges, and thereby to eliminate . . . discrimination and favoritism . . . .

Southern Pacific Transp. Co. v. Commercial Metals Co., 456 U.S. at 344. See also, *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S.Ct. at 2766. Here, if the Commission's arguments prevail and Transcon's loss of discount provisions are voided, discrimination would occur because all shippers utilizing Transcon's services would receive the discounted rates, regardless of when the freight charges were paid. Shippers who paid in more than 90 days would, in effect, be given preferential treatment by being granted the same terms as shippers who paid in less than 90 days. This is exactly what the ICC's credit regulations were intended to prevent. *Consolidated Rail Corp. v. Container Systems Corp.*, 453 F. Supp. at 421; see also, 49 U.S.C. § 10741(b) ("A common carrier . . . may not subject a person . . . to unreasonable discrimination")

Although the ICC has attempted to paint the trustee as the "villain" and the shippers as "helpless victims", the reality of this case is far different as the court of appeals recognized:

> The equities here are not necessarily with the late-paying shippers. They enjoyed an extension of credit by the carrier while the carrier became insolvent. It is not unfair to make them now contribute to the payment of the carrier's unsecured creditors.

Pet. at 20a-21a. These shippers intentionally and willfully declined to pay discounted freight charges within the published 90-day period. They took undue and improper advantage of Transcon's extension of credit. As a result, Transcon's cash flow was severely jeopardized and it was forced into bankruptcy. Numerous people lost their jobs and are owed substantial sums of money. As a matter of law and as a matter of equity, these shippers ought not be relieved of their obligation to pay the non-

discounted rates published in Transcon's tariffs which are applicable to shippers who fail to pay freight charges in the time allotted.

CONCLUSION

For the foregoing reason a writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

[ORIGINAL]

FIRST AMENDED
PROOF OF CLAIM

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

Case Number ak-90-10680-RR
Chapter 7

IN RE TRANSCON LINES,
Debtor(s)

[Filed Feb. 4, 1991]

AMOUNT OF CLAIM: $23,053,976.18

Claimed as (X) General unsecured $18,179,717.20
(XX) Administrative $3,324.81
(XX) Priority $4,870,717.20

1. Name of Creditor (print or type)
   Teamsters National Freight Industry Negotiating Committee

   Mailing Address

   c/o Reich Adell & Crost,
   501 Shatto Place Suite 100
   Los Angeles, California 90020

2. The debtor was, at the time of the filing of the petition, and still is, indebted (or liable) to this claimant, see attached list in the sum of $23,053,976.18.

3. The consideration for this debt is as follows: Unpaid wages under collective bargaining agreement, severance pay, and damages under 29 U.S.C. Section 2104(a).

4. (If the claim is founded on writing), the writing on which this claim is founded (or a duplicate thereof) is attached hereto (or cannot be attached for the reason set forth in the following statement). See attached.

5. (If appropriate), this claim is founded on an open account, which became (or will become) due on ————————, as shown by the itemized statement attached hereto.

6. No judgment has been rendered on the claim except: None.

7. The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

8. This claim is not subject to any set off or counterclaim except: None.

9. No security interest is held for this claim except: Statutory lien under California Code of Civil Procedure Section 1204 (If security interest in property of the debtor is claimed), the undersigned claims the security interest under the writing referred to in paragraph 4 hereof. Evidence of perfection of such security interest is also attached hereto.

10. This claim is an unsecured claim, except to the extent that the security interest, if any, described in paragraph 9 is sufficient to satisfy the claim. It is not entitled to priority unless the reason for priority and the amount claimed as priority is set forth below. Wages and severance pay earned within 90 days of petition, 11 U.S.C. Section 507(a)(3).

11. If claimant has obtained this claim by assignment, a copy of explanation of said assignment is attached hereto.

Name of Creditor (print or type) Teamsters National Freight Negotiating Committee

Signature /s/ [Illegible]

Title (corporation officer, partner or agent) Reich, Adell & Crost, Attorneys for Creditors

Date 1/31/91

PENALTY FOR PRESENTING FRAUDULENT CLAIM: FINE OF NOT MORE THAN $5,000 OR IMPRISONMENT FOR NOT MORE THAN FIVE (5) YEARS OR BOTH—TITLE 18, U.S.C. SECTION [Illegible]

PROOF OF CLAIM FIRST AMENDED

CLAIM NUMBER 177-156

DESCRIPTION OF CLAIMS

This is the First Amended Claim of the Teamsters National Freight Industry Negotiating Committee ("Teamsters") for wages and other amounts due to former employees of the debtor represented by the Teamsters, and for damages under the Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. § 2104(a). This claim amends Claim No. 177-156 filed on June 20, 1990, and Claim No. 215-192 filed on May 25, 1990.

The Teamsters file this claim on behalf of, and as the statutory bargaining agent of the former employees of the debtor listed in the claim, in order to enforce the collective bargaining agreements (listed in Attachment B) to which the debtor and the Teamsters are signatory. *See* 29 U.S.C. § 185. In addition, those employees indicated by an asterisk (*) by their social security number have each executed an individual claim form and Power of Attorney,

authorizing the Teamsters and the firm of Reich, Adell & Crost to represent them in these proceedings. A blank form is attached here as Exhibit A. The complete forms are too bulky to file with the Court, but may be viewed at the law offices of Reich, Adell & Crost, 501 Shatto Place, Suite 100, Los Angeles, CA 90020. Clyde Flowers may be called at (213) 386-3860 to arrange for an appointment. The data for all other employees was obtained from the payroll records of the debtor.

This claim is a priority claim to the extent allowed under 11 U.S.C. § 507(a)(3) for wages, including vacation, severance and sick leave pay, earned within 90 days of the bankruptcy. The claims include the following elements, which correspond to the columns in the Summary of Claims for each individual which is Attachment D here.

——GROSS AMOUNTS——

I. PRIORITY WAGES $4,898,274.85

This includes unpaid wages earned from January 31, 1990 to the filing of the petition on May 1, 1990, including holiday pay. It also includes vacation, sick pay, and the annual profit sharing payment ($350) accrued in the year before the bankruptcy petition, all divided by 4 to account for only the amount earned 90 days before the petition. This column is not adjusted for the $2,000.00 per employee limit of § 507(a)(3).

II. GENERAL WAGES $7,835,099.42

This includes the ¾ of vacation, sick pay, and profit sharing accrued in the last year before the bankruptcy petition, not credited to priority claims. It also includes unpaid wages earned before January 31, 1990, and vacation, etc. earned in prior years which remains unpaid.

III. MISCELLANEOUS CLAIMS $397,320.37

This includes other amounts due under the collective bargaining agreement not included above, such as griev-

ance awards, unpaid medical expenses and employee out-of-pocket expenses which should have been reimbursed.

IV. SEVERANCE PAY $2,381,743.93

This is the two-weeks of severance pay due to all Teamster employees who were on the payroll for the week ending April 20, 1990, pursuant to the Settlement Agreement approved by the Court. A copy of the Settlement Agreement is Attachment B here. Pursuant to that agreement, this amount is a part of the priority claims under § 507(a)(3). By a separate Settlement Agreement also approved by the Court, a copy of which is Attachment C, those Teamster employees remaining on the payroll after the filing of the bankruptcy petition have the option of making an administrative claim for their vacation and sick pay accrued during the bankruptcy, or taking the severance pay as a priority claim. For purposes of this First Amended Claim, these individuals are listed with their severance pay as a priority claim, since the debtor has not provided the information necessary to calculate any administrative claims. However, *the Teamsters and the individual employees retain the right to amend their claim to opt for an administrative claim instead.* The information for the amount of severance pay was obtained from the debtor's payroll records. Where information was unavailable, the severance pay has been estimated at $1,000.00.

V. WARN ACT CLAIMS $7,538,212.81

On or about April 20, 1990, the debtor closed nearly all of its facilities and permanently laid off approximately 3,000 employees at its terminals located throughout the United States. The employees listed here are represented by the Teamsters. No prior notice of the shut down and lay-offs was given to any affected employee, the Teamsters, or any of its affiliated local unions, as required by the WARN Act, 29 U.S.C. § 2102. Pursuant to 29 U.S.C.

§ 2104, the debtor is liable to each affected employee for 60 days wages and benefits. In addition, attorneys fees per 29 U.S.C. § 2104(a)(6) are claimed, in an amount to be determined.

Pursuant to the Settlement Agreement (Attachment B), the severance pay described above is credited against any WARN Act claims. The amounts shown here reflect that credit.

—— TOTAL AMOUNTS CLAIMED ——

VI. PRIORITY $4,870,934.17

This is the sum of the Priority Claims and Severance Pay listed above, up to the maximum of $2,000.00 per employee in accordance with 11 U.S.C. § 507(a)(3)(B). This is the amount of Priority Claim asserted here.

VII. GENERAL $18,179,717.20

This is the sum of the General Claims, Miscellaneous Claims, WARN Act claims, plus that portion of the Priority and Severance Claims for each employee which exceeds the $2,000.00 limit. This is the amount of General Claims asserted here.

VIII. ADMINISTRATIVE $3,324.81

These are wage claims of Teamster employees working for the estate after the filing of the bankruptcy on May 1, 1990. As stated above, this may be increased to include the accrued vacation and sick pay for those eligible employees who opt to do so in lieu of severance pay. This also constitutes a claim and demand for the Administrative expenses agreed to in Attachment C.

TOTAL CLAIM $23,053,976.18

APPENDIX B

UNITED STATES BANKRUPTCY COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Bankrupt No. LA90-10680-RR
IN THE MATTER OF: TRANSCON LINES

GENERAL UNSECURED PROOF OF CLAIM IN BANKRUPTCY

[Filed Oct. 17, 1990]

THOMAS J. FRAWLEY, on the date hereinafter set forth, being first duly sworn deposes and says:

1. That he is the Manager, Withdrawal Liability of Central States, Southeast and Southwest Areas Pension Fund, the Claimant herein, maintaining offices at 9377 West Higgins Road in the City of Rosemont, County of Cook, State of Illinois, 60018-4938, that he is duly authorized by said Trust Fund to make the proof of Claim.

2. That debtor was and still is justly and truly indebted to said claimant for a pro-rata portion of the unfunded vested liabilities of said Trust Fund, under the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (29 U.S.C. Sec. 1381(a)), in the sum of fifteen

million, nine hundred sixty-six thousand, three hundred sixty-seven and 72/100ths. $15,966,367.72

3. That the consideration of said debt is services performed by certain employees of the debtor.

4. That no part of said debt has been paid.

5. That there are no set offs or counter-claims to said debt.

6. That Claimant does not hold, and has not received any security for the debt, nor has any person by the Claimant's order or knowledge or belief had or received any security for the debt.

7. That this claim is filed as an unsecured general claim.

8. That the Pension Fund is filing this claim without prejudice or waiver of any of the rights it has under the Multiemployer Pension Plan Amendments Act of 1980, the Employee Retirement Income Security Act of 1974 (ERISA), the Revised and Amended Trust Agreement of the Central States, Southeast and Southwest Areas Pension Fund, and without prejudice to all of its rights in law or equity to pursue this assessment or any other assessment against Transcon Lines and/or any other entity and/or any other person and/or any other party in interest.

On information and belief that the foregoing is true, accurate and complete to the best of the claimant's knowledge, this Proof of Claim is dated at Rosemont, Illinois this 12th day of October, 1990.

CENTRAL STATES,
SOUTHEAST AND
SOUTHWEST AREAS
PENSION FUND

By: /s/ Thomas J. Frawley
THOMAS J. FRAWLEY
Manager
Withdrawal Liability

[Notary Omitted in Printing]

Supreme Court, U.S.
FILED
APR 22 1993
OFFICE OF THE CLERK

No. 92-1547

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

INTERSTATE COMMERCE COMMISSION,
Petitioner

v.

TRANSCON LINES, ET AL.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITION OF INTERSTATE COMMERCE COMMISSION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT — REASONS FOR GRANTING THE WRIT	4
I. This Case Raises Issues of Extraordinary Importance	4
II. The Decision Below Conflicts with Numerous Federal Court Decisions	8
III. The Ninth Circuit Has Erred in Deciding an Important Question of Federal Law	10
CONCLUSION	15

TABLE OF AUTHORITIES

Cases:	Page
ADM of Mississippi, Inc., 1990 Fed. Carr. Cas. (CCH) ¶ 37,834	9
Delta Traffic Service, Inc. v. ADM of Mississippi, Inc., No. 91-1098 (5th Cir. 1992)	9
Delta Traffic Service, Inc. v. Mennen Co., 730 F.Supp. 1309 (D.N.J.), *aff'd.* 919 F.2d 134 (3rd Cir. 1990)	9
Delta Traffic Service, Inc. v. Purdue Frederick Co., 1989 Fed. Carr. Cas. (CCH) ¶ 83,508 (D.Conn. 1989)	9
Fidelcor Business Credit Corp. v. Dillard Department Stores, No. 91-953-Civ-J-16 (M.D. Fla.) (referral order entered July 30, 1992)	9
Lifschultz Fast Freight, Inc. v. National Manufacturing Co., 804 F.Supp. 1059 (N.D. Ill. 1992)	9
Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990)	*passim*
Olson Distributing Systems, Inc. v. Glasurit America, Inc., 850 F.2d 295 (6th Cir. 1988)	11
Regulations for Payment of Rates and Charges — Penalty Charges for Nonpayment, 5 I.C.C. 2d 691 (1989)	2
Reiter v. Cooper, ___ U.S. ___, 113 S.Ct. 1213 (1993)	*passim*
Rocky Mountain Motor Tariff Bureau, Inc. v. I.C.C., 590 F. 2d 865 (10th Cir. 1979)	14

	Page
Southern Pacific Transportation Co. v. Commercial Metals Co., 456 U.S. 336 (1982)	*passim*

Statutes and Regulations:

49 U.S.C. § 10743	7
49 U.S.C. § 11702(a)(4)	13
49 C.F.R. Part 1320	*passim*
49 C.F.R. § 1320.2(g)(iii)	11
49 C.F.R. § 1320.2(g)(iv)	11

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INTEREST OF *AMICI CURIAE*[1]

Amicus National Small Shipments Traffic Conference, Inc., includes among its more than 450 members, individuals, small companies and major corporations. *Amicus* Health and Personal Care Distribution Conference, Inc. includes among its 70 members most major manufacturers of drugs, medicines and toiletries, as well as many smaller companies. Both *amici* (hereinafter "Shipper Conferences") are nonprofit membership corporations whose principal activities involve pursuing the interests of their members in their capacities as shippers of

[1] All parties to this case have consented to the filing of this brief. Copies of the parties' consent letters have been filed with the Clerk of the Court.

freight, primarily via motor carriers subject to the provisions of the Interstate Commerce Act and regulations of the Interstate Commerce Commission (ICC) issued pursuant to that Act. Many members were customers of Respondent, Transcon Lines, prior to its bankruptcy.

The deluge of undercharge cases which has accompanied the bankruptcies of numerous motor carriers since enactment of the Motor Carrier Act of 1980 is well known to this Court. Shipper Conferences have been required to devote a major proportion of their resources to proceedings before the ICC and major cases before the courts concerning typical undercharge claims against shippers. Shipper Conferences participated as *amici curiae* in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and in *Reiter v. Cooper*, ___ U.S. ___, 113 S.Ct. 1213 (1993). In addition, the Conferences participated as *amici* in this case before the Ninth Circuit, and the undersigned participated in the oral argument before the court of appeals.

Shipper Conferences were the leading shipper parties in the ICC proceedings during the period 1986-1989 that led to adoption of the credit regulations at issue here, published at 49 C.F.R. Part 1320. Indeed, the provisions of the present regulations that the ICC adopted in order to *prevent* the result allowed under the decision below were adopted at the request of these Shipper Conferences and with the joint sponsorship of the trucking industry, acting through the American Trucking Association. See *Regulations for Payment of Rates and Charges — Penalty Charges for Nonpayment*, 5 I.C.C. 2d 691 (1989).

Many members of the Shipper Conferences have been made defendants against undercharge claims by bankrupt trucking companies based on the theory that loss of discount penalties for late payments can be imposed in clear violation of the ICC's credit regulations, several years after the bills were paid.

The Shipper Conferences support the ICC's petition for a writ of certiorari. Shipper Conferences represent a wealth of experience not just with the credit regulations at issue in this case, but also with the practical consequences for all freight shippers of the decision below. The purpose of this brief is to supplement the arguments of the ICC with a discussion, from the shipper community's perspective, of the need for review of that decision by the Supreme Court, and for reversal.

SUMMARY OF ARGUMENT

The portion of the decision below that is the subject of the ICC's Petition concerned claims for undercharges that Transcon filed against numerous shippers based on tariff provisions imposing a severe penalty for late payment of freight charges. Based upon a late payment provision in its tariff, Transcon seeks to collect the difference between the discounted tariff rates originally billed and paid and full undiscounted tariff rates. The latter rates are almost 100% higher than the rates billed and paid.

The ICC's credit regulations provided important safeguards to preclude a carrier from accumulating large sums of late payment penalties by not informing shippers of that liability and not promptly claiming the penalty, so that the shipper could avoid recurrences of late payments. The public protections built into the regulations included: a plain notice on any original freight bills subject to prospective penalty that the discount would be forfeited if not paid by a certain date; a requirement that the carrier rebill at the higher rate within 90 days; and a provision precluding accumulation of penalty charges for a series of bills for presentation in bulk.

Transcon's collection efforts, long after the fact and based on bills where late payment notices were not given, were found to violate the ICC credit regulations published at 49 C.F.R. § 1320. But the Ninth Circuit went on to hold that the ICC could not obtain an injunction against Transcon's violations of ICC

regulations because Transcon's filed tariff trumps those regulations. In so holding, the Ninth Circuit effectively deprived not just the ICC, but also thousands of shipper defendants, of their only effective remedy against claims which violate the regulations on their face. Moreover, because of its breadth, the court's holding has the effect of undermining all agency regulations, and public reliance on those regulations is now tenuous. By substituting the supremacy of any filed tariff over the ICC's regulations, the effects of this ruling, if not reversed, would be devastating.

The decision below is also objectionable because it conflicts with numerous rulings by other federal courts, including the Third and Fifth Circuit. As matters stand, the ICC's credit regulations are in effect in the Third and the Fifth Circuit, but not in the Ninth Circuit. Since the carrier brings the action and selects the forum, by adroit forum-shopping a carrier can flout the Commission's rules as to most shippers. The relationship between carrier tariffs and ICC regulations should be uniform nationwide.

Finally, the court of appeals has misread decisions of this Court dealing with ICC jurisdiction, the filed rate doctrine, and statutory powers invested in the ICC to control carrier credit practices. Under those decisions, the ICC is not powerless to remedy carrier violations of its regulations, merely because the carrier continues to supervene the regulations by crafting a tariff provision which purports to nullify them.

ARGUMENT — REASONS FOR GRANTING THE WRIT

I. This Case Raises Issues of Extraordinary Importance

Like *Reiter*, this case is a sequel to *Maislin*. *Maislin* and *Reiter* concerned undercharges based on the bankrupt carrier's attempt to substitute tariff rates for the unfiled rates the carrier formerly quoted and billed and the shipper had paid. In both

cases, this Court recognized the role of the ICC in assessing the reasonableness of the tariff rates on which the undercharges were based. This case, in contrast, involves a dispute over which of two sets of filed rates — discounted tariff rates, or the higher undiscounted tariff rates — should apply.

In the decision below, the Ninth Circuit rejected any role for the ICC in resolving the dispute, even though the ICC has clear statutory authority over tariffs and credit practices. The ICC had conducted a rulemaking and promulgated regulations pursuant to that authority, and was before the court of appeals under its statutory enforcement authority seeking to enjoin Transcon's violations of those regulations. The court below reached its result because of its belief, based entirely on its reading of *Maislin*, that the filed rate doctrine makes tariff provisions controlling even where the carrier violated ICC regulations governing credit penalties.

The decision below actually conflicts with *Maislin*, *Reiter* and other Supreme Court precedent, and with recent decisions on this very issue by other federal courts of appeals and district courts. Therefore, review by this Court would be warranted even if the decision were not such a dangerous precedent. However, the damage caused by the decision below, absent review and reversal, will be enormous. The Ninth Circuit's holding, that by a tariff provision a carrier can "trump" the agency's regulations and accomplish a result the regulations were designed to prevent, extends beyond this case and pervasively into the law governing administrative agencies in general. The mere thought that a regulated company can defeat an agency's regulations by a tariff provision is chilling.

Before discussing the broader implications of the Ninth Circuit's decision, Shipper Conferences point out that the adverse impacts of the decision are severe even in the context of this "one" bankruptcy case. Early in the Transcon bankruptcy proceedings, Transcon filed adversary proceedings against

340,000 former shippers, making Transcon's the broadest undercharge campaign in history in terms of its direct impact upon the shipping public.

There is no way for these Shipper Conferences to know how many shippers will be sued, or for how much, on the basis of Transcon's loss of discount for late payment penalty. The Ninth Circuit suggests that $15 million is claimed under this theory (ICC Petition, App. 3a), but this amount was as of a time prior to completion of Transcon's audit. Absent review and reversal, much of this $15 million, and much of any additional amount in similar claims Transcon has developed since 1990, is almost certain to be lost by shippers, despite the Ninth Circuit's finding (ICC Petition, App. 17a-18a) that Transcon violated the law.

To a shipper faced with claims for late payment forfeitures, mounting a defense means litigation, legal fees, and, in most cases, discovery. Pressures to settle, without regard to the validity of a bankrupt carrier's claims, can be irresistible, particularly for the small companies. Ordinarily, such defendants must look to the ICC for help against meritless undercharge claims, but the ICC's efforts in the case below were unavailing. Even *Chevron* deference was withheld. (ICC Petition, App. 18a.) In short, if claims like these cannot be resisted on legal grounds, specifically the ICC's credit regulations, they can rarely be resisted at all.

The adverse impacts of the decision below on Transcon's former shippers are compounded by the expansive nature of the Ninth Circuit's reasoning. It is difficult to think of a more egregious violation of ICC regulations. And yet Transcon, based on the Ninth Circuit's misreading of *Maislin*, stands to collect millions of dollars from shippers who paid the tariff rate they were originally billed.

The Interstate Commerce Act *prohibits* the extension of credit *except under regulations of the Commission*. 49 U.S.C.

§ 10743. Compliance with the regulations is thus a prerequisite, mandated by Congress, for *any* extension of credit. The specific regulations that Transcon violated were adopted for the express purpose of preventing credit provisions in carrier tariffs from becoming the trap for the unwary that Transcon has now sprung. Where the carrier notes its loss-of-discount penalties on its bills of lading and issues timely individual rebillings for the higher penalty amounts within 90 days after expiration of the authorized credit period, the shipper is put on notice of the penalty and of its failure to meet the specified payment date. If the shipper thus receives notice that it has paid a bill late, it can take corrective action and prevent the accumulation of a large penalty balance. The practical impact of the Ninth Circuit's decision is that a carrier can stand by and accumulate three years of bills before it goes bankrupt, without telling the shipper along the way that any payment arrived late.

Thus, this case does not involve a minor or inadvertent deviation from some technicality buried in the Code of Federal Regulations. As to all its shippers, Transcon consistently ignored *all* the key requirements of the regulations governing imposition of the additional penalty charges it seeks to collect. Yet the Commission's credit regulations were the sole basis under the statute for its credit-based billing practices. If such violations as these are permissible under the filed rate doctrine, *any* ICC regulation that implements the requirements of the Interstate Commerce Act is in jeopardy. What good is an agency's regulation if it can be rendered void by the carrier?

As a result of the Ninth Circuit's opinion, Transcon is certain to brush aside shipper defenses based on any violation of ICC regulations, whether those regulations concern credit penalties or any other aspect of its tariffs. Nor can the damage be confined to the *Transcon* case. Other bankrupt carriers will cite the Ninth Circuit's decision in support of the proposition that their tariffs, like Transcon's, bind all their former shippers,

notwithstanding any violations of ICC regulations they may have committed. The effect would be a "regulatory agency" whose regulations mean nothing.

Finally, it must be recognized that the filed rate doctrine does not apply solely to bankrupt motor carriers. It also applies to solvent motor carriers, to railroads, and even to tariff services outside the context of the Interstate Commerce Act. If *Maislin* can be extended to fields such as energy law and communications law that are also characterized by extensive federal regulation, it takes no great leap of the imagination to foresee efforts to extend the Ninth Circuit's erroneous interpretation of *Maislin* into other regulatory areas.

The extraordinary importance of this case warrants granting the ICC's Petition.

II. The Decision Below Conflicts with Numerous Federal Court Decisions

Transcon was not the first bankrupt carrier to file undercharge claims based on the alleged failure of its former shippers to pay freight charges within the tariff credit period. And, in light of the Ninth Circuit's decision, the number of such cases will increase exponentially.[2]

The leading case on the issue of violations of ICC credit regulations in an undercharge case involved The Mennen Company, a member of one of the Shipper Conferences. Asserting that the bankrupt carrier's claims were invalid due to credit rule violations, Mennen obtained referral of the issue to the ICC under the doctrine of primary jurisdiction; and the Commission found such violations to be unreasonable practices in violation of the Act. 1989 WL 239321 (I.C.C.). The District Court

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[2] Consider, as an example, a carrier which did not include late payment notices on any of its freight bills. Based upon ICC regulations, after going into bankruptcy it did not make any claims for forfeitures. But the Ninth Circuit has issued an invitation to resurrect all such claims.

subsequently granted summary judgment for the shipper, affirming the ICC's decision, and the Third Circuit affirmed in an unpublished opinion. *Delta Traffic Service, Inc. v. Mennen Co.*, 730 F.Supp. 1309 (D.N.J.), *aff'd.* 919 F.2d 134 (3d Cir. 1990).

Summary judgment based on a similar ICC decision in *ADM of Mississippi, Inc.*, 1990 Fed. Carr. Cas. (CCH) ¶ 37,834 (1990 WL 287541 I.C.C.) was affirmed in an unpublished decision by the Fifth Circuit in *Delta Traffic Service, Inc. v. ADM of Mississippi, Inc.*, No. 91-1098 (5th Cir. 1992).

Though no other courts of appeals have addressed the issue, similar conclusions have been reached in numerous federal district court cases. See, *e.g., Delta Traffic Service, Inc. v. Purdue Frederick Co.*, 1989 Fed. Carr. Cas. (CCH) ¶ 83,508 (D. Conn. 1989) (referring the credit rules issue to the ICC and citing similar decisions in the District of Delaware and the District of Indiana). The ICC also addressed the credit rules issue, and found violations in cases referred by district courts in the Districts of New Jersey and Ohio. See the Commission decisions published at 1990 Fed. Carr. Cas. (CCH) ¶ 37,776 and 1992 Fed. Carr. Cas. (CCH) ¶ 37,951 (1991 WL 259987 I.C.C.).[3]

The most recent decision is *Lifschultz Fast Freight, Inc. v. National Manufacturing Co.*, 804 F.Supp. 1059 (N.D. Ill. 1992), the first post-*Transcon* decision dealing with undercharge claims involving penalties claimed in violation of ICC credit regulations. The court explained (804 F.Supp. at 1064):

> To hold as the court did in *Transcon* in effect renders meaningless all the conditions to an extension of credit in 49 C.F.R. 1320-29. The regulations outlined

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[3] A corporate affiliate of Transcon, a bankrupt carrier formerly known as PIE Nationwide, Inc., has filed 30,000 undercharge actions, a number of which involve loss of discount claims. One such case is pending before the ICC on referral by the district court. *Fidelcor Business Credit Corp. v. Dillard Department Stores*, No. 91-953-Civ-J-16 (M.D. Fla.) (referral order entered July 30, 1992).

> by the ICC pursuant to its granted authority must be complied with before a carrier can invoke a loss-of-discount remedy. Otherwise, the ICC is stripped of authority as granted by Congress in the Interstate Commerce Act.

The Ninth Circuit brushed aside the contrary decisions of the Third and Fifth Circuits, saying they were unpublished and concerned tariff penalty provisions adopted when ICC credit regulations did not permit such penalties. ICC Petition, App. 19a-20a. But this distinction makes no sense. Tariffs either supersede regulations or they don't. If absolute prohibitions against loss of discount penalties in the previous ICC regulations were controlling, restrictions on such penalties in the current regulations must also be given effect.

To date, the credit rules issue presented in this case has confronted three courts of appeals (two of which — the Third and the Fifth — have disagreed with the Ninth Circuit) and district courts in at least three other circuits. The pervasiveness and importance of the issue cannot be disputed. Nor can the need for uniformity on a federal question that only this Court can provide.

Because of clear and deepening conflicts among the courts of the various circuits as to an issue of nationwide importance, the ICC's Petition should be granted. Otherwise, the bankrupt carriers will be beating a path to the courts in the Ninth Circuit.

III. The Ninth Circuit Has Erred in Deciding an Important Question of Federal Law

Not only does this case have far-reaching impacts for carriers and shippers, operating under a federal system of regulation, but the Ninth Circuit's legal analysis is plainly erroneous.

The Ninth Circuit's decision cannot be reconciled with this Court's decision in *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982). This Court

refused to allow a *judicially* created affirmative defense based on carrier violations of credit rules. However, the Court was careful to note the ICC's primary role in administering its credit regulations. See, *e.g.*, 456 U.S. at 351: "The remedies for a carrier's violations of the regulations are best left to the ICC for such resolution as it thinks proper." And, as the ICC notes in its Petition, these remedies include "the power to seek a federal-court injunction requiring a carrier to comply with the regulations." 456 U.S. at 349, quoted in the ICC Petition at 14. This is precisely the relief the Ninth Circuit denied.

To the extent that there are differences between this case and *Commercial Metals*, they compound the Ninth Circuit's error. For example, in *Commercial Metals*, the Court noted that the regulations themselves did not provide that a carrier violation precluded collection. The current regulations do prohibit collection of *penalty* charges where the carrier has violated the credit rules. See, *e.g.*, 49 C.F.R. § 1320.2(g)(iii) and (vi). The first of these subsections states that the penalty "shall be applied only to the nonpayment of original separate and independent freight bills and shall not apply to aggregate balance-due claims sought for collection on past due shipments by a bankruptcy trustee, or any other person or agent." Subsection (vi) permits collection "only" where the 90-day rebilling requirement has been met.

It is also important to note that in *Commercial Metals* the shipper was trying to use the carrier's violation of the credit rules as an excuse for paying no freight charges to the carrier. In *Transcon*, freight charges have already been paid, and the issue concerns the carrier's desire to collect a penalty on top of those charges despite its violations of ICC regulations. *Transcon* is, therefore, akin to the double-payment cases that this Court recognized in *Commercial Metals* as an exception to the rule. 456 U.S. at 351. See also *Olson Distributing Systems, Inc. v. Glasurit America, Inc.*, 850 F.2d 295 (6th Cir. 1988), holding

the carrier equitably estopped in a double payment case where its delays in pursuing collection deprived the shipper of notice of the accumulation of charges and led to an escalation of the loss.

Of great significance here is this Court's recognition in *Maislin* of the ICC's primary jurisdiction over the reasonableness of carrier *practices*,[4] at least where the case turns on which of two filed rates is applicable, as this one does. See 497 U.S. at 129, n. 11:

> None of our cases involving a determination by the ICC that the carrier engaged in an unreasonable practice has required departure from the filed tariff schedule altogether; instead, they have required merely the application of a different filed tariff. For example, in *Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84, 86, 83 S.Ct. 157, 158, 9 L.Ed.2d 142 (1962), the Commission's finding that a carrier had engaged in an unreasonable practice by routing intrastate shipments over interstate routes

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[4] Numerous courts have recognized the propriety of referral of the shipper's defense to the ICC. These Shipper Conferences must therefore disagree with the statement in the ICC's Petition that a shipper cannot raise the carrier's violation of the credit regulations in defense of an action to collect the filed rate. Petition at 5. Under the circumstances that surround this issue, recognition of ICC primary jurisdiction is entirely consistent with *Commercial Metals*. As this Court noted then, "The facts of this case illustrate the problems that may arise when a court ventures to create law in this highly technical field." 456 U.S. at 350, n. 11. Those words are equally applicable now.

The Ninth Circuit's decision does not discuss *Commercial Metals*, but relies instead on *Maislin*. This reliance is misplaced. It is, of course, true that *Maislin* affirmed the continued vitality of the filed rate doctrine, even to the point of overturning, as violative of the statute, an ICC policy recognizing unfiled rates. But here there is no unfiled rate; both rates are filed, the discounted rate and the penalty rate.

> required only the application of a different filed rate, *i.e.*, the intrastate rates, rather than departure from the tariff schedule entirely. See also *Adams v. Mills*, 286 U.S. 397, 412, 52 S.Ct. 589, 593, 76 L.Ed. 1184 (1932) (reparations ordered constituted difference between one filed rate and another). Likewise, the cases in which the ICC has determined that a carrier engaged in an unreasonable practice by requiring a certain notation attached to the bill of lading to qualify the shipper for a reduced tariff also did not require deviation from the filed tariff. See *Standard Brands, Inc. v. Central R. Co. of New Jersey*, 350 I.C.C. 555 (1974); *Carriers Traffic Service, Inc. v. Anderson Clayton & Co.*, 881 F.2d 475, 481-82 (CA 7 1989) (collecting cases).

Under *Maislin* and *Reiter*, when a shipper asserts that a carrier's undercharge claims involve unreasonable practices (other than its simple failure to file an agreed rate) or unreasonable rates that violate the Interstate Commerce Act, the shipper is not required to pay the claims until it has obtained a ruling on the statutory unreasonableness issues from the ICC under the Commission's primary jurisdiction. Thus, under this Court's decisions (and those of many other courts that have considered credit rules issues in other cases) the filed rate doctrine cannot bar the Commission's exercise of its jurisdiction in an adjudication of reasonableness issues involving claims against an individual shipper.

Resort to the ICC is a cumbersome procedure to follow where a bankrupt carrier files thousands of collection actions and the violation of ICC regulations is undisputed. Recognizing the value of a direct enforcement action, the ICC filed a civil action under 49 U.S.C. § 11702(a)(4) to enjoin Transcon's

violations. Under *Commercial Metals*, its right to do so i unquestionable.[5]

In contravention of established law, the Ninth Circui decided to accord the tariff supremacy over ICC regulations The Ninth Circuit has misread *Maislin*. In order to correct th court of appeals' clear error of law, and to prevent irreparabl injury to Transcon's former shippers, to other shippers confront ing undercharge claims, and to the agency's statutory right t make enforceable regulations, this Court should review an reverse the decision below.

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[5] The Commission's authority to proceed by rulemaking is equally we established. See, e.g., *Rocky Mountain Motor Tariff Bureau, Inc. v. I.C.C* 590 F. 2d 865 (10th Cir. 1979), upholding ICC regulations nullifying speci residential delivery charges in carrier tariffs as an unreasonable practice.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in the ICC's Petition, the ICC's petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 92-1547

In the Supreme Court of the United States

OCTOBER TERM, 1992

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

TRANSCON LINES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases:

	Page
Adams v. *Mills*, 286 U.S. 397 (1932)	4
Hewitt-Robins, Inc. v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962)	4
Maislin Indus., U.S., Inc. v. *Primary Steel, Inc.*, 497 U.S. 116 (1990)	3
Reiter v. *Cooper*, 113 S. Ct. 1213 (1993)	3, 4, 5
Southern Pacific Transp. Co. v. *Commercial Metals Co.*, 456 U.S. 336 (1982)	2, 3, 5

Statutes:

49 U.S.C. 10743	2
49 U.S.C. 11702(a)(5)	2
49 U.S.C. 11705(b)(3)	5

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1. Respondents' contention that the ICC may not enforce its credit regulations against Transcon and its trustee rests on a basic error. According to respondents (Br. in Opp. 5), the ICC is seeking to "'step into the shoes' of the shipper" in requesting an injunction that would preclude the carrier from collecting certain charges in violation of the ICC's credit regulations. Respondents then argue (Br. in Opp. 5-6, 14) that, because this Court has held that a *shipper* may not assert the carrier's violation of the credit regulations as an equitable defense to a

carrier's collection action, see *Southern Pacific Transp. Co.* v. *Commercial Metals*, 456 U.S. 336, 349 (1982), the ICC is likewise foreclosed from enjoining the carrier's collection of charges in violation of the credit regulations.

The ICC, however, is not asserting the rights of shippers in seeking an injunction against respondents; the ICC is relying on its own statutory rights and powers to enforce the Act. The ICC has express authority to "bring a civil action—to enforce this subtitle * * * or a regulation or order of the Commission * * * when violated by a [motor] carrier providing transportation subject to the jurisdiction of the Commission * * *." 49 U.S.C. 11702(a)(5); Pet. App. 64a-65a. The action brought by the ICC against respondents enforces the regulations of the Commission governing when a carrier may release goods without payment and collect damages for late payment. Those regulations are explicitly authorized by the statutory prohibition of credit transactions except in accordance with ICC regulations. 49 U.S.C. 10743.

Thus, in bringing this action, the ICC is relying wholly on *its* statutory authority to enforce the Act. Indeed, respondents' argument turns the Court's analysis in *Commercial Metals* on its head. The Court explained in *Commercial Metals* that shippers may not resist payment through the ad hoc assertion of credit-regulation defenses in particular cases, because "[t]he remedies for a carrier's violation of the [credit] regulations are best left to the ICC for such resolution as it thinks proper." 456 U.S. at 352. The Court stated that such remedies include "the power to seek a federal-court injunction requiring a carrier

to comply with the regulations." *Id.* at 349. If respondents' theory were accepted, the Commission would be powerless to obtain effective relief against a defunct carrier, like Transcon, whose trustee flouts the ICC's credit rules.[1]

2. Respondents err in claiming (Br. in Opp. 6, 9) that *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), insulates them from the ICC's injunction action. *Maislin* dealt with a policy that permitted the enforcement of unfiled, negotiated rates; this Court invalidated that policy "because it would 'rende[r] nugatory' the specific command of [49 U.S.C.] § 10761 that the carrier charge the filed rate." *Reiter* v. *Cooper*, 113 S. Ct. 1213, 1216 (1993); *Maislin*, 497 U.S. at 133. *Maislin* does not bar the ICC from remedying a violation by "requir[ing] only the application of a different filed rate * * * rather than departure from the tariff schedule entirely." 497 U.S.

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[1] Respondents concede (Br. in Opp. 7) that the ICC has the power to "seek injunctions against carriers that violate its credit regulations." They assert (*id.* at 14), however, that *Commercial Metals* does not authorize an injunction where the ICC seeks to prevent the collection of charges in violation of the credit regulations. But respondents fail to explain how else the ICC could use an injunction to enforce its credit regulations against a bankrupt carrier whose trustee is systematically violating the ICC's credit regulations. While respondents mention remedies against operating carriers, and raise the possibility of fines against culpable individuals (*id.* at 13), it is clear that respondents' real aim is to retain the freedom to collect additional charges from shippers, admittedly in violation of the ICC's credit regulations (*id.* at 3), with complete impunity. That claim cannot be squared with the Court's statement in *Commercial Metals* that it is for the ICC to select the appropriate remedy for credit-regulation violations.

at 129 n.11 (citing *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84, 86 (1962), and *Adams* v. *Mills*, 286 U.S. 397, 412 (1932)). At most, that would be the effect of the ICC's requested injunction here.[2] See Pet. 12-15.

The injunction requested by the ICC would not foreclose the carrier from charging a filed rate. Respondents are entitled to collect the filed *discount* rate, which was the rate due upon delivery of the goods. Respondents can also collect interest charges from late-paying shippers, in order to be made whole for any delay in payment.[3] The effect of the requested injunction is simply to prevent respondents from prosecuting collection actions that clearly violate the credit regulations. *Maislin* does not preclude that remedy.

3. As our petition explains (Pet. 14-15), the court of appeals' characterization of *Maislin* is one that this Court clearly rejected in *Reiter* v. *Cooper*, *supra*. Respondents seek to avoid (Br. in Opp. 6-7) the impact of *Reiter* on this case by making the same fallacious argument discussed above—that the ICC is asserting the rights of shippers. That is not so.

The relevance of *Reiter* to this case lies in the Court's clarification that the filed rate doctrine,

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[2] As we argue in our petition (Pet. 11-12), the additional charges that the ICC seeks to enjoin respondents from collecting constitute liquidated damages, not a filed rate. But even if we assume that they are a filed rate, *Maislin* is inapplicable to the issue of *which* of two filed rates applies.

[3] Because the shippers must pay interest, see Pet. 4 n.4, respondents err in suggesting (Br. in Opp. 12) that late-paying shippers would gain any advantage over shippers who paid on time.

while precluding "common-law claims and defenses," does not preclude "avoidance of the tariff rate * * * through claims and defenses that are specifically accorded by the [Interstate Commerce Act] itself." 113 S. Ct. at 1219. In *Reiter*, the claim accorded by the Act was the right of a shipper to obtain reparations (49 U.S.C. 11705(b)(3)); here, the claim accorded by the Act is the statutory right of the ICC to obtain an injunction to enforce its credit regulations. In both cases, the same principle applies: the filed rate doctrine does not override all other requirements of the Act, but must be harmonized with those other requirements.

The court of appeals failed to harmonize the filed rate doctrine with the Act's prohibition of credit transactions except as authorized by the ICC's credit regulations and with the agency's authority to seek injunctions to enforce those requirements. The result is that respondents stand to collect substantial unjustified charges, and the agency with authority to enforce the credit regulations is denied an effective means to carry out that responsibility. Respondents give no adequate reason for letting that judgment stand.

For the foregoing reasons, and those stated in our petition, the petition for a writ of certiorari should be granted, the judgment should be vacated, and the case remanded for further consideration in light of *Reiter* v. *Cooper*, *supra*. In the alternative, the judgment of the court of appeals should be summarily reversed, on the authority of that decision and *Southern Pacific Transp. Co.* v. *Commercial Metals*, *supra*.

Respectfully submitted.

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